a UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Judicial Circuit.

Pleas and Proceedings Had and Done at a Regular Term of the United States Circuit Court of Appeals for the Fifth Circuit, Begun on Friday, November 24th, A. D. 1916, at New Orleans, Louisiana, Before the Honorable Don A. Pardee and the Honorable Richard W. Walker, Circuit Judges, and the Honorable William I. Grubb, District Judge.

PANAMA RAILROAD COMPANY, Plaintiff in Error,

versus

THEODORE BOSSE, Defendant in Error.

Be it remembered, that heretofore, to-wit, on the 18th day of November, A. D. 1916, a transcript of the record of the above
b styled cause, pursuant to a writ of error from the District Court of the Canal Zone, was filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 3015, as follows:

c TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals, Fifth Circuit.

No. 3015.

PANAMA RAILROAD COMPANY, Plaintiff in Error,

versus

THEODORE BOSSE, Defendant in Error.

Error to the District Court of the Canal Zone.

[Original Record Filed November 18, 1916.]

U. S. Circuit Court of Appeals. Filed Dec. 6, 1916. Frank H. Mortimer, Clerk.

1 UNITED STATES OF AMERICA:

CANAL ZONE,
District Court, ss:

Pleas Before the Honorable William H. Jackson, Judge of the District Court of the Canal Zone, at a Term Thereof Begun and Holden in the Balboa Division of said District Court, in the Courthouse at Ancon, Canal Zone, on the 3rd day of July, Being the First Day of the July Term, in the year of Our Lord One Thousand Nine Hundred and Sixteen.

Present:

Honorable William H. Jackson, Judge.
Hon. Charles R. Williams, District Attorney.
Mr. Wm. H. May, Marshal.

Attest:
E. M. GOOLSBY, *Clerk.*

And the following proceedings were had:

Complaint.

UNITED STATES OF AMERICA,
Canal Zone:

In the United States District Court, Balboa Division, Canal Zone.

Civil. No. 119.

THEODORE BOSSE, Plaintiff,

vs.

THE PANAMA RAILROAD COMPANY, a Corporation, Defendant.

Complaint.

Comes now the plaintiff in the above-entitled cause and for his cause of action against the defender, states:

2 (1). That the plaintiff is a resident of the City of Balboa Heights, Canal Zone, and that the defendant is and at all times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of New York, and having capacity to sue and liable to be sued as such, and as such corporation was a common carrier of passengers for hire between the town of Balboa Heights, Canal Zone, and the City of Panama, Republic of Panama, and doing business in the Canal Zone.

(2). That as such common carrier, the defendant corporation

operated and now operates a motor bus on the Balboa road between the City of Balboa Heights and the City of Ancon, Canal Zone, and was engaged in such business during the entire month of July, 1916.

(3). That in the afternoon of the third day of July, 1916, while the plaintiff was walking along the Balboa road within the municipal limits of the City of Balboa Heights, Canal Zone, and about one hundred and sixty yards from the Administration Building in said City of Balboa Heights, the motor bus of the defendant corporation, operated by a chauffeur *on* the employ of said defendant company, came along the said Balboa road from the said Administration Building, going in the direction of the City of Ancon, at a high rate of speed in excess of twenty miles per hour, and without warning, struck the plaintiff and knocked him down, the wheels of said motor buss passing over him crushing the right foot and breaking the bones thereof and causing plaintiff such severe injuries that he was forthwith removed to Ancon Hospital for treatment.

(4). That at the time of the injury of the plaintiff by the motor bus of the defendant corporation in the manner and form aforesaid, there was a large number of people on the said Balboa road, including women and children, and that the chauffeur in the employ of the defendant company who was driving the said motor bus,
3 so negligently, carelessly, unlawfully, and recklessly drove the car aforesaid as to injure the plaintiff in the manner and form aforesaid, and that the injury of the plaintiff was due wholly and exclusively to the negligence of the defendant company and that the plaintiff in no way contributed to his said injury.

(5). That the plaintiff has endured extreme pain and suffering as the result of said injury; that he has been confined for a considerable length of time in the Ancon Hospital, during which said time he has been constantly under the care of physicians; that as a result of said injury the plaintiff has also suffered extreme mental anguish and has been incapacitated from the performance of his customary duties and that the injury to the plaintiff in addition is of a permanent nature.

(6). That by virtue of the premises, plaintiff has been injured and damaged in body, mind, health, pain and suffering, loss of time and necessary expenses, in the sum of ten thousand dollars, ($10,000.00) United States currency.

Wherefore plaintiff prays judgment against the defendant for the sum of ten thousand dollars ($10,000.00) United States currency, together with his proper costs in this behalf expended.

(Sgd.) HINCKLEY & GANSON,
Attorneys for Plaintiff.

Filed July 12, 1916.

* * * * * * *

4 *Appearance.*

UNITED STATES OF AMERICA,
Canal Zone:

In the District Court of the Canal Zone, Division of Balboa.

Comes now the defendant company in the above entitled cause by its counsel, Frank Feuille and Walter F. Van Dame, and enters an appearance in the above entitled and numbered cause.

THE PANAMA RAILROAD COMPANY,
A CORPORATION, *Defendant,*
(Sgd.) By FRANK FEUILLE, *Counsel.*
(Sgd.) WALTER F. VAN DAME, *Asst. Counsel.*

Filed Jul- 21, 1916.

Defendant's Demurrer.

UNITED STATES OF AMERICA,
Canal Zone:

In the District Court of the Canal Zone for the Division of Balboa.

Civil. No. 119.

THEODORE BOSSE, Plaintiff,

vs.

THE PANAMA RAILROAD COMPANY, a Corporation, Defendant.

Defendant's Demurrer.

Now comes the Panama Railroad Company, defendant in the above styled cause, by its attorneys Frank Feuille and Walter
5 F. Van Dame, and demurs to the plaintiff's complaint herein, because the same does not state facts sufficient to constitute a cause of action and the said defendant especially demurs to all that part of plaintiff's complaint wherein mental and physical pain and suffering are set up as an element of damages,

Premises considered, defendant Company prays that the complaint be dismissed and for its costs.

THE PANAMA RAILROAD COMPANY,
A CORPORATION, *Defendant,*
(Sgd.) By FRANK FEUILLE.
(Sgd.) WALTER F. VAN DAME.

Ancon, C. Z., July 24, 1916.

Filed Jul- 24, 1916.

Notice of Motion to Amend Complaint.

UNITED STATES OF AMERICA,
Canal Zone:

In the United States District Court, Balboa Division, Canal Zone.

Civil. No. 119.

THEODORE BOSSE, Plaintiff,

vs.

THE PANAMA RAILROAD COMPANY, a Corporation, Defendant.

Notice of Motion to Amend Complaint.

To Messrs. Frank Feuille and Walter F. Van Dame, attorneys for the above named defendant, Greeting:

Take notice that on Saturday, the 29th of July, 1916, at nine (9) o'clock in the morning of said day, or so soon thereafter as counsel can be heard, the undersigned, as attorneys for the plaintiff
6 above named, will move the Court sitting in Ancon, to be allowed to amend the complaint of plaintiff heretofore filed in this cause in conformity with the motion herein filed.

(Signed) HINCKLEY & GANSON,
Attorneys for Plaintiff.

Filed July 27th, 1916.

Motion for Leave to Amend.

UNITED STATES OF AMERICA,
Canal Zone:

In the United States District Court, Balboa District, Canal Zone.

Civil. No. 119.

THEODORE BOSSE, Plaintiff,

vs.

THE PANAMA RAILROAD COMPANY, a Corporation, Defendant.

Motion for Leave to Amend.

Comes now the plaintiff in the above-entitled cause on this 27th day of the month of July, 1916, and shows unto the Court that subsequent to the date of filing the complaint in this action, plaintiff's

second toe of the right foot was amputated in Ancon Hospital as a direct result of the injury complained of in the complaint heretofore filed.

Wherefore plaintiff moves that he be allowed to amend his complaint inserting therein such new matter as may be pertinent to the issues in accordance with Section 103 of the Code of Civil Procedure of the Canal Zone.

(Sgd.) HINCKLEY & GANSON,
Attorneys for Plaintiff.

Filed July 27, 1916.

7 *Amended Complaint.*

UNITED STATES OF AMERICA,
Canal Zone:

In the United States District Court, Balboa Division, Canal Zone.

Civil. No. 119.

THEODORE BOSSE, Plaintiff,

vs.

THE PANAMA RAILROAD COMPANY, a Corporation, Defendant.

Amended Complaint.

Comes now the plaintiff in the above-entitled cause and for his cause of action against the defendant, states:

(1) That the plaintiff is a resident of the City of Balboa Heights, Canal Zone, and that the defendant is and at all times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the States of New York, and having capacity to sue and liable to be sued as such, and as such corporation was a common carrier of passengers for hire between the town of Balboa Heights, Canal Zone, and the City of Panama, Republic of Panama, and doing business in the Canal Zone.

(2) That as such common carrier, the defendant corporation operated and now operates a motor bus on the Balboa road between the City of Balboa Heights and the City of Ancon, Canal Zone, and was engaged in such business during the entire month of July, 1916.

(3) That in the afternoon of the third day of July, 1916, while the plaintiff was walking along the Balboa road within the municipal limits of the City of Balboa Heights, Canal Zone, and about one hundred and sixty *years* from the Administration Building in said City of Balboa Heights, the motor bus of the defendant corporation, operated by a cha-ffeur in the employ of said defendant cor-

8 poration, came along the said Balboa road from the said Administration Building, going in the direction of the City of Ancon, at a high rate of speed in excess of twenty miles per hour, and without warning negligently struck the plaintiff and knocked him down, the wheels of said motor bus passing over him crushing the right foot and breaking the bones thereof and causing plaintiff such severe injuries that he was forthwith removed to Ancon Hospital for treatment, in which said hospital plaintiff has been under the care of doctors employed in said hospital up to and including the present date and in which said hospital it became necessary to remove and the surgeons in said hospital did remove the second toe of plaintiff's right foot as a direct and proximate result of the injury inflicted upon the plaintiff by reason of the negligent, careless and wilful act of the servant of the defendant corporation in the manner and form aforesaid.

(4) That at the time of the injury of the plaintiff by the motor bus of the defendant corporation in the manner and form aforesaid, there was a large number of people on the said Balboa road, including women and children, and that the chauffeur in the employ of the defendant corporation who was driving the said motor bus, so negligently, carelessly, unlawfully, and recklessly drove the *care* [car] aforesaid as to injure the plaintiff in the manner and form aforesaid, and that the injury of the plaintiff was due wholly and exclusively to the negligence of the defendant corporation and that the plaintiff in no way contributed in his said injury.

(5) That the plaintiff has endured extreme pain and suffering as a result of said injury; that he has been confined for a considerable length of time in the Ancon Hospital, during which said time he has been constantly under the care of physicians; that as a result of said injury the plaintiff has also suffered extreme mental anguish and has been incapacitated from the performance of his customary duties and that the injury to the plaintiff in addition is of a permanent nature.

9 (6) That by virtue of the premises, plaintiff has been injured and damaged in body, mind, health, pain and suffering, loss of time and necessary expenses, in the sum of Ten Thousand Dollars ($10,000.00) United States currency.

Wherefore plaintiff prays judgment against the defendant for the sum of Ten Thousand Dollars ($10,000.00) United States currency, together with his proper costs in this behalf expended.

(Sgd.) HINCKLEY & GANSON,
Attorneys for Plaintiff.

Filed July 27th, 1916.

Motion re Demurrer to Amended Complaint.

UNITED STATES OF AMERICA,
Canal Zone:

In the District Court of the Canal Zone, Division of Balboa.

Civil. No. 119.

THEODORE BOSSE, Plaintiff,

vs.

THE PANAMA RAILROAD COMPANY, a Corporation, Defendant.

Motion re Demurrer to Amended Complaint.

Comes now the defendant company in the above styled and numbered cause, by its attorneys, Frank Feuille and Walter F. Van Dame, and prays the Honorable Court to permit said defendant company's demurrer to plaintiff's original complaint, which demurrer was heretofore filed on July 24th, 1916, to be made to apply and to be extended to plaintiff's amended complaint as filed on July 27th, 1916.

THE PANAMA RAILROAD COMPANY,
A CORPORATION, *Defendant,*
(Sgd.) By FRANK FEUILLE, *Counsel*
(Sgd.) WALTER F. VAN DAME, *Asst. Counsel.*

Filed July 27th, 1916.

Minutes of July 29th, 1916.

No. 119.

THEODORE BOSSE

vs.

PANAMA RAILROAD COMPANY.

Damages—Personal Injury.

Parties in Court by their respective attorneys. Plaintiff's motion for leave to file amended complaint. The demurrer filed by defendant is extended to the Amended Complaint. The same is overruled and defendant's exception is noted. And defendant is given one week within which to answer complaint.

Motion for Trial by Jury.

UNITED STATES OF AMERICA,
Canal Zone:

In the District Court for the Canal Zone, Ancon Division, Canal Zone.

Civil. No. 119.

THEODORE BOSSE, Plaintiff,

vs.

THE PANAMA RAILROAD CO., Defendant.

Motion for Trial by Jury.

Now on this 31st day of the month of July, 1916, comes the plaintiff herein by his attorneys, Messrs. Hinckley & Ganson, and
11 moves the Court that he be afforded the right of trial by jury accorded him in accordance with the laws of the Canal Zone in such cases made and provided.

(Sgd.) HINCKLEY & GANSON,
Attorneys for Plaintiff.

Filed July 31, 1916.

Answer.

UNITED STATES OF AMERICA,
Canal Zone:

In the United States District Court, Balboa Division, Canal Zone.

Defendant's Answer.

Civil. No. 119.

THEODORE BOSSE, Plaintiff,

vs.

THE PANAMA RAILROAD COMPANY, a Corporation, Defendant.

Now comes the Panama Railroad Company, defendant in the above-numbered and entitled cause, by its attorneys Frank Feuille and Walter F. Van Dame, and without waiving any of the demurrers or exceptions heretofore filed in this case, but insisting on said demurrers and exceptions, and answers the amended complaint of the plaintiff, as follows:

The defendant admits that it is a corporation duly organized under the laws of the State of New York, and is doing business in the Canal Zone.

The defendant denies each and all of the other allegations of the plaintiff's complaint.

The defendant especially denies that the injuries complained of by the plaintiff were due to the fault or negligence of the de-
12 fendant; and the defendant here charges that said alleged injuries were due to the plaintiff's own fault and negligence.

Premises considered, defendant prays for judgment and for cost of suit.

THE PANAMA RAILROAD COMPANY,
A CORPORATION, *Defendant*,
(Sgd.) By FRANK FEUILLE,
(Signed) WALTER F. VAN DAME.

Ancon, C. Z., August 4, 1916.

Filed Aug. 4, 1916.

Minutes of August 19th, 1916.

No. 119. Personal Injury.

THEODORE BOSSE

vs.

PANAMA RAILROAD CO.

This case coming on regularly for trial the parties hereto are in open Court by their respective attorneys and the attorneys for the defendant company admit that the motor bus by which the plaintiff was injured was owned and operated by the Panama Railroad Company, defendant herein.

A jury being called come the following jurors of a jury of good and lawful men to-wit: R. V. Small, Karl P. Curtis, Bernard G. Anderson, Chas. C. Cameron, E. J. Rall, David F. Fisher, J. W. Barrett, B. J. Robinson, A. D. Stevenson, Ed Good, Walter Brown, and Thos. McCabe, who are duly elected tried and sworn well and truly to try the issues joined herein and a true verdict render according to the law and the evidence. And the plaintiff having introduced evidence and rested the attorney for the defendant moves the Court to direct the jury to return a verdict for the defendant because no negligence of the defendant has been shown and
13 the plaintiff was at the time he was injured on the wrong side of the road. The motion is overruled and after hearing the evidence adduced on behalf of the defendant and that in rebuttal for the plaintiff the Court charged the jury among other things that, if the jury find that injury was solely the result of the man on the bicycle as the intervening cause the verdict should be in favor of the defendant; and that if it was not so found by the jury but that the defendant was guilty of negligence, the plaintiff's physical pain and suffering may be considered as grounds for dam-

ages. The defendant's attorneys then and there noted his exception to that part of the charge relative to physical pain and suffering. And the jury after deliberating on their verdict, say in open Court, the attorneys of the respective parties being then and there present, by a written verdict, "We, the jury, on the issues joined herein, find for the plaintiff and assess his damages in the sum of $2500.00." Signed: James W. Barrett, Foreman. The defendant's attorney gives notice of his motion for a new trial.

The jurors are discharged and the Court adjourns to Aug. 21, 1916.

Motion for New Trial.

UNITED STATES OF AMERICA,
Canal Zone:

In the District Court of the Canal Zone for the Division of Balboa.

Civil. No. 119.

THEODORE BOSSE, Plaintiff,

vs.

THE PANAMA RAILROAD COMPANY, a Corporation, Defendant.

Motion for New Trial.

The Honorable William H. Jackson, Judge of the said Court:

Now come Frank Feuille and Walter F. Van Dame, Attorneys for the Panama Railroad Company, defendant herein, and
14 respectfully ask the Court to set aside the verdict rendered by the jury in this case on the 19th inst., and grant the defendant a new trial for the following reasons, to wit:

First. Because the Court refused to direct a verdict for the defendant, upon the termination of the plaintiff's evidence, as requested by defendant's counsel.

Second. Because the Court refused to direct the jury to bring in a verdict for the defendant upon the close of the evidence on behalf of the plaintiff and defendant, although requested so to do by defendant's counsel.

Third. Because the Court refused the request of defendant's counsel to instruct the jury that they should not consider physical pain and suffering as an element of damage in the case.

Fourth. Because the Court erred in instructing the jury to consider physical pain and suffering as an element of damage in the case.

Fifth. Because the verdict of the jury was contrary to the law and the evidence in the case.

1. It was contrary to the law, (*a*) because the evidence failed to show negligence on the part of the defendant; (*b*) the evidence

clearly established the fact that the accident was due entirely to an intervening cause, to-wit; the action of the colored bicyclist, who obstructed the rightful passage of the omnibus, and that the defendant's chauffeur was without fault; (*c*) because there was no evidence tending to prove pecuniary damages of any kind.

11. The verdict was contrary to the evidence, which clearly established that the accident was not due to the negligence of the defendant's chauffeur.

Sixth. Because the verdict of the jury is excessive.

Premises considered, defendant respectfully prays that the verdict herein rendered by the jury be set aside, and that a new trial be granted.

(Sgd.) FRANK FEUILLE,
(Sgd.) WALTER F. VAN DAME.

Ancon, Canal Zone, August 25, 1916.

Filed Aug. 25, 1916.

Minutes of August 26, 1916.

No. 119. Personal Injury.

THEODORE BOSSEE

vs.

PANAMA RAILROAD CO., a Corporation.

This day the parties to this cause are in open Court by their respective attorneys and arguments being heard on the defendant's motion for a new trial, the said motion is overruled. And the defendant's attorney then and there excepted to the said ruling and the same is noted.

Whereupon it is ordered by the Court that Theodore Bossee, plaintiff herein, have and recover of and from the defendant the Panama Railroad Company, a corporation, the sum of $2500.00 damages and the further sum of $26.15 costs and expenses herein together with interest on said sums at the rate of six per centum per annum from date till paid. Defendant's exception to said judgment is noted. Notice of appeal is given and the defendant is given fifteen days within which to file the Bill of Exceptions

16 *Bill for Costs.*

UNITED STATES OF AMERICA,
Canal Zone:

In the United States District Court in and for the Balboa Division.

Civil. No. —.

THEODORE BOSSE, Plaintiff,

vs.

THE PANAMA RAILROAD COMPANY, a Corporation, Defendant.

Bill for Costs.

Comes now the plaintiff in the above-entitled cause and files his bill for costs in said cause and moves that the items therein contained be taxed by the Clerk of the Court as costs to form part of the judgment as heretofore rendered.

To filing complaint			$8.00
" service of summons and mileage			1.10
" Marshal's fees for subpœnas served as follows:			
Dan Wright	35	cents	
H. C. Cunningham	35	"	
W. A. Lawler	35	"	
Clarke Rocheford	35	"	
A. F. Morris	35	"	
A. W. Palmer	35	"	
Isidor Rudolph	35	"	
Hugh Wynne	35	"	
Dr. Earhart	25	"	
			3.05
" filing complaint			4.00
" fees of counsel			10.00
Total			$26.15

17 ANCON,
Canal Zone, ss:

Theo. C. Hinckley, of lawful age, being first duly sworn upon oath states that he is one of the attorneys for the plaintiff in the above-entitled cause; that as such he is more familiar than the plaintiff with the items of costs incurred in said cause; that he has read the above and foregoing costs bill and the items therein stated and that the same is true and correct. And further affiant sayeth not.

(Sgd.) THEO. C. HINCKLEY.

Subscribed and sworn to before me this 26th day of August, 1916.

(Sgd.) E. M. GOOLSBY,
[SEAL.] *District Court Clerk.*

Filed August 26, 1916.

Minutes of September 9th, 1916.

No. 119. Personal Injury.

THEODORE BOSSE

vs.

PANAMA RAILROAD COMPANY.

This day parties to this action are in open Court by their respective attorneys and agreeing, the defendant is allowed ten days' additional time within which to file a Bill of Exceptions herein.

18 *Statement of Facts and Bill of Exceptions.*

UNITED STATES OF AMERICA,
Canal Zone:

In the District Court of the Canal Zone, Division of Balboa.

Civil. No. 119.

THEODORE BOSSE, Plaintiff,

vs.

THE PANAMA RAILROAD COMPANY, a Corporation, Defendant.

Be it remembered that on the trial of the above styled and numbered cause, on the nineteenth day of August, nineteen hundred and sixteen, the following proceedings were had:

The parties having announced ready for trial, and a jury of twelve good and lawful men having been selected, impaneled and sworn to try the issues herein, and it having been admitted by the defendant that the 'bus that struck the plaintiff was owned and operated at the time of the accident by the defendant company, and that the chauffeur who drove the 'bus was an employee of the defendant company at said time, the plaintiff, in order to sustain the issues in his behalf, adduced the following evidence:

Mr. DAN. E. WRIGHT, the first witness called for the plaintiff, after being duly sworn, testified as follows:

That he is the Municipal Engineer of the Panama Canal and is familiar with the lay-out of the highways and buildings in the

vicinity of the Administration Building of The Panama Canal at Balboa Heights; that there is a road leading from the rear entrance of the Administration Building to Ancon; that this road is joined by another road leading from the railroad station, at Balboa to Ancon at a point about seven hundred to seven hundred and twenty feet from the Administration Building; that the place where
19 the two aforementioned roads join is opposite the residence of the Reverend Wise; that the roads in this vicinity are twenty-five feet wide and that on the right of the road leading from the Administration Building to Ancon there is a grassplot three feet wide running parallel to the road which is bounded by a drainage ditch; that the drainage ditch referred to is about eighteen inches deep, and that the difference in elevation between the crown of the road and the bottom of the drainage ditch is about two feet; that on the left of the road leading from the Administration Building to Ancon there is no drainage ditch and that the road on that side is skirted by a wide lawn; that at a distance of about two hundred feet from the Administration Building there commences a rather steep hill which hill continues to the jointure of the two roads above-mentioned; that there are no sidewalks in the vicinity of the Administration Building; that there are no sidewalks along the side of the road where Bosse was struck, and that this road was generally used by pedestrians going to and coming from the Administration Building at Balboa Heights; that there are signs posted at various points within the Canal Zone in conspicuous places warning vehicles not to exceed a speed of eight miles per hour when passing through towns and villages within the Zone, and not to exceed fifteen miles per hour in the rural districts. (Plaintiff at this point in the witness's testimony introduced in evidence a blue print showing the lay-out of streets and buildings in the vicinity of the Administration Building at Balboa Heights, which blue print, according to the witness, correctly indicated the lay-out of streets and buildings within the area covered by the map), and that the point at which he understood the accident occurred, was situated within the municipal limits of the town of Balboa Heights.

Cross-examination of Mr. Wright:

Mr. Wright was not cross-examined by counsel for the defendant company.

20 Mr. A. F. MORRIS, the second witness called for the plaintiff, after being duly sworn, testified as follows:

That he is the Supervisor of Fortifications for the Panama Canal and that on the afternoon of July 3rd, at about 5:03, he boarded the Panama Railroad motor 'bus which left the Administration Building for Ancon; that the 'bus was crowded and that he was hanging onto a strap toward the rear of the vehicle; that there were several other persons hanging onto straps nearer the front of the 'bus who cut off his view from anything occurring on the road in front of the vehicle; that the 'bus upon leaving the Administration Building did not go

very fast; that when the machine reached a point near the foot of the hill he felt a slight jar and felt the 'bus swerve to the right and stop; that he looked out of the rear of the 'bus and saw Mr. Bosse lying on the ground near the centre of the road; that considering the relative position of the 'bus after it came to a stop and the place in which he at that time saw Bosse was lying from ten to fifteen feet behind the bus after it came to a stop; that he could not say how fast the 'bus was going when it struck Bosse.

Cross-examination of Mr. A. F. Morris:

That on a wild guess he would say that the loaded 'bus weighed five tons; that he did not see a colored man on a bicycle; that he knows that the rule of the road within the Canal Zone to be that vehicles must keep to the left and that the overtaking vehicle must pass the vehicle being overtaken on the right; and that this rule, he believed, was generally observed by pedestrians; that on the afternoon in question he saw pedestrians on both sides of the road; that the Panama Railroad 'busses run on a schedule and always leave the Administration Building at from three to five minutes after five in the afternoon.

21 Mr. W. A. LAWLOR, the third witness introduced by the plaintiff, after being duly sworn, testified as follows:

That he is employed as a clerk by the Panama Canal in the Administration Building; that on the afternoon of July third, shortly after five o'clock, while walking from the Administration Building toward Ancon, he was overtaken by a Panama Railroad motor 'bus which was going at the rate of twenty miles per hour; that after passing him, he noticed a colored man riding a bicycle in front of the 'bus; that the bicyclist was going down the hill in the same direction in which the 'bus was being driven; that the colored man weaved from one side of the road to the other and then passed out of his range of vision, which was cut off by the 'bus; that shortly thereafter he saw the 'bus swerve rather sharply to the right and stop; that upon reaching the point at which the 'bus had stopped he learned that the colored man had been knocked off his bicycle and that he saw Mr. Theodore Bosse lying on the ground at a distance of ten to fifteen feet to the rear of the 'bus; that Mr. Bosse lay a little to the right of the centre of the road at a point where the road from the administration Building to Ancon and the road leading from the depot in Balboa to Ancon meet; that there were many people (including women and children) on both sides of the road at this time, who were coming from their work in the Administration Building and walking toward Ancon; that the 'bus passed him at a rate of speed of approximately 20 miles an hour shortly before it struck Bosse; that he judged this to be the rate of speed based upon his knowledge and experience as a train dispatcher which position he had occupied for a number of years in which his duties had enabled him to gauge the speed of railroad trains; that he did not see Bosse struck, and consequently, could not swear to the rate of speed at

which it was going at that time; that the road was dry and dusty and that it was impossible for the automobile to skid and that the weather was clear and fair; that he assisted in putting Mr. Bosse into
22 a jitney which conveyed him to the Ancon Hospital; that there are no sidewalks in the vicinity of the Administration Building.

Cross-examination of Mr. W. A. Lawlor:

That he does not know at what rate of speed the 'bus was going when it struck Bosse; that he does not know the rule of the road within the Canal Zone except in a general way and is not sure that it applies to pedestrians; that he has no idea of the weight of a loaded Panama Railroad 'bus; that these 'busses run on a schedule and that one leaves the Administration Building at two or three minutes after five every afternoon.

CLARK ROCHEFORD, the fourth witness called for the plaintiff, after being duly sworn, testified as follows:

That on the afternoon in question, at a few minutes after five o'clock, he was riding on a bicycle from the Administration Building toward Ancon on the same road traversed by the Panama Railroad motor 'busses; that at the time there were a great many people walking along the road toward Ancon, and that because of this and the steepness of the hill, he was not going more than four miles an hour; and that because of the people in the road which have already been referred to, it was necessary for him to move in and out at the rate of about four miles an hour to avoid striking pedestrians in the road; that he did not hear the 'bus approaching him from the rear nor did he hear any warning signals being given by the 'bus; that when he reached a point near the intersection of the road he was riding on with the road leading from Balboa to Ancon, and while on the left side of the road, he was run down by the 'bus and knocked off his bicycle; that he saw Mr. Bosse ahead of him on the right hand side of the road.

Cross-examination of Clark Rocheford:

The witness was not cross-examined by defendant company's counsel.

23 Mr. C. C. CUNNINGHAM, the fifth witness called by the plaintiff, after being duly sworn, testified as follows:

That he is employed in the Administration Building of the Panama Canal as a clerk; that at a few minutes after five o'clock on the afternoon of July third, he was walking from the Administration Building toward Ancon; that he heard the rumbling of the 'bus behind him and heard the clanging of its gong; that he saw a colored man upon a bicycle riding down the hill in front of the 'bus; that the 'bus passed him at the rate of speed of about eighteen miles per hour and that the 'bus at that time was on the right hand side

of the road; that he saw Mr. Bosse about thirty feet ahead of him; that the 'bus struck the negro, knocking him off his machine; then swerved to the right and struck Mr. Bosse, who at that — was walking down the road, slightly to the right of the center thereof; and that the 'bus slowed down after having passed him; that the road was well crowded with people, including women and children and vehicles; and that it was dry and dusty.

Cross-examination of Mr. C. C. Cunningham:

That he knows the rule of the road within the Zone; that pedestrians walk on either side of the road as far as he knows; that he saw nothing in Bosse's hands; that Mr. Bosse did not appear to be reading; that he did not see Bosse look around toward the coming 'bus; that not more than five seconds elapsed between the time the 'bus struck the bicycle and the time it struck Bosse.

Dr. C. W. EARHART, the sixth witness called for the defendant, after being duly sworn, testified as follows:

That he is chief surgeon for the Panama Canal at the Ancon Hospital; that on the afternoon of July third, shortly after five o'clock,
Mr. Bosse was brought into the operating room of the Ancon
24 Hospital suffering from an injury to the right foot, of a crushed nature; that both Mr. Bosse's knees and one of his hands were also bruised, but not seriously; that the injury to Mr. Bosse's foot was dressed and that he was put to bed; that on the tenth day following the accident it became apparent that the circulation in the second toe of the injured foot was not being restored, and for which reason the said toe was amputated; that Mr. Bosse suffered considerable pain and was given several hypodermic injections during the time he was confined to the hospital to relieve his pain and to induce him to sleep; that the injuries sustained by Mr. Bosse, except for the loss of his toe, are not permanent, but that he could not definitely and positively say that the foot would be well in six months or at all; that within six months the swelling in the injured foot would probably disappear; that at worst Mr. Bosse would have to wear a slightly larger sized shoe if the swelling did not entirely disappear; that the great toe on the injured foot was also fractured at the time Mr. Bosse was brought into the hospital, but that the fracture was healing satisfactorily and that no trouble was expected from that source.

(At this point in the witness's testimony there was shown him the shoe which Mr. Bosse was supposed to have worn on the injured foot at the time of the accident. The witness was asked whether or not the sole of the shoe had tended to reduce the severity of the injury to plaintiff's foot; the witness replied that he was of the opinion that the sole of the shoe had no doubt tended to lessen the extent of the plaintiff's injury. Plaintiff also exhibited to the jury his injured foot at the request of plaintiff's attorney.)

Cross-examination of Dr. C. W. Earhart:

That the loss by a person of any except the great toe would not noticeably interfere with a person's walk; that in walking, the great toe is the one from which the spring is gotten; that the fractured great toe was healing satisfactorily and that within six months
25 plaintiff, he believed, would be able to walk as well as he ever could; and that the loss of a second toe would not interfere with a person's earning capacity or activities unless he were an athlete.

Mr. THEODORE BOSSE, the plaintiff, on his own behalf, after being duly sworn, testified as follows:

That he is a clerk in the employ of the Panama Canal in the Administration Building at Balboa Heights; that on the afternoon of July third, nineteen hundred and sixteen, shortly after five o'clock, he was walking down the road leading from the Administration Building at Balboa Heights to Ancon in the Company of Mr. Palmer, Chief Timekeeper for the Panama Canal; that Mr. Palmer had just left him and gone in the direction of his own house when he heard the rumbling of the motor 'bus behind him, that he stepped off the road onto the grass plot on the right hand side of the road and that while he was standing there the 'bus came up behind him, struck him and knocked him down, and that the front wheels of the 'bus passed over his knees and the rear wheel over his right foot; that he was picked up off the ground and taken to the operating room of the Ancon Hospital where the second toe of his right foot was amputated; that he suffered very great physical pain and on account of his injuries was unable to sleep for the greater part of three weeks, while in the hospital; that his right leg from the knee to the foot was black and blue and continued to pain him severely; that it was necessary for him to be given hypodermic injections to relieve his pain and induce sleep; that he was employed at a salary of one hundred and seventy-five dollars per month; that he returned to his work on the thirtieth day of July. (At this point in the plaintiff's testimony there was shown him a shoe which he identified as the one he had worn on the day he received his injuries, which shoe was introduced in evidence; there was also here introduced in evidence a pair of black trousers rent across both knees, which plaintiff identified as the trousers he wore on the day and at the time he received his injuries.)

26 Cross-examination of Mr. Theodore Bosse:

That he heard no sounds of warning being given by the 'bus which ran him down; that the only thing which caused him to leave the road was the fact that he heard the rumbling of the 'bus from his rear; that he was not walking in or near the middle of the road and that the only explanation he can give as to his being found in the middle of the road is that the 'bus in striking him must have knocked him into the road as it swerved around to the left; that he

did not look around at any time in order to ascertain whether or not he was safe from being run down by the 'bus; that he is still drawing a salary of one hundred seventy-five dollars per month; that he was absent from work from July 5th to July 29th inclusive, but that under the Panama Canal system of allowing employees sick leave, he had actually lost no time,—that payment of a part of his pay for the month of July would merely be deferred for a period of six months; that he was not reading and had nothing in his hand when struck.

Counsel for plaintiff at this time stated to the Court that no claim was being made against the defendant company for any monetary loss sustained by plaintiff because of loss of time as a result of his injuries.

Thereupon plaintiff rested his case;

Whereafter counsel for the defendant company moved the Court to direct the jury to return a verdict for the defendant, basing said motion on the ground that plaintiff had shown no negligence on the part of the defendant company and that the plaintiff had failed to show that the direct and proximate cause of his injuries was the result of any negligence on the part of the defendant; furthermore, that all of the testimony of plaintiff's witnesses indicated that the conduct and negligence of the negro on the bicycle were the direct and proximate cause of plaintiff's injuries and that as a mat-
27 ter of law, the negro's negligence, his negligence being the proximate cause of the accident, insulated any negligence that the defendant company's servant might have been guilty of.

Whereupon the Court overruled defendant's motion for a directed verdict, to which ruling an exception was taken.

Thereafter, the defendant company, in order to sustain the issues in its behalf, adduced the following evidence:

Mr. M. E. DREGHORN, the first witness called for the defendant company, after being duly sworn, testified as follows:

That he is a clerk in the employ of the Panama Canal at Balboa Heights; that on the afternoon of July third, at about 5:05, he was walking along the road parallel to the road upon which the motor 'busses run; that the road which he was on leads from the Administration Building to the Ancon Hospital; that at the time Mr. Bosse was injured, he was about seventy-five yards distant from him; that he first noticed the 'bus when it was near the top of the decline and that it was running at the rate of possibly twenty miles per hour; that the 'bus was leaving the Administration Building and going in the direction of Ancon; that going in the same direction and in front of the bus there was a colored man upon a bicycle and that the colored man was about thirty-five yards in front of the 'bus and going at the rate of about ten miles per hour; that, apparently, when the colored man heard the rumbling of the 'bus from his rear, he crossed to the right hand side of the road and after continuing on

that side of the road for a distance of about twenty yards, he crossed to the left side of the road; that the 'bus was traveling at a greater rate of speed than the bicycle and the 'bus operator turned his machine to the left side of the road; that after the 'bus crossed to the left of the road, the negro also crossed to the left side of the road, and thereupon the negro was struck and thrown off his bi-
28 cycle; that Mr. Theodore Bosse, who was walking along the right side of the road, was also knocked down by the 'bus; that at the time the 'bus neared the bicycle its speed had been very much reduced; that at the time of the occurrence there were approximately five pedestrians on the right side of the road and possibly twelve on the left hand side of the road; that Mr. Bosse was included in the number that were walking on the right side of the road; that he did not actually see the 'bus strike Mr. Bosse as his vision of Bosse was cut off by the 'bus at the moment Bosse was struck; that his statements relative to the speed are only approximate; that the rule of the road is that vehicles must keep to the left and that the over taking vehicle must pass the overtaken one on the right; that he thinks the rule applies also to pedestrians and is generally known among employees in the Administration Buildings and is observed by them.

Cross-examination *by* Mr. M. E. Dreghorn:

That the ringing of the 'bus's gong is what attracted his attention to the 'bus, the negro on the bicycle, and finally to Mr. Bosse; that at the point at which he stood he could plainly see the things to which he has testified; that Mr. Bosse was on the right hand side of the road when struck.

Mr. JOHN S. PALMORE, the second witness called for the defendant Company, after being duly sworn, testified as follows:

That he is a first-class Zone policeman and that on July 3rd, shortly after 5:00 P. M. he was on duty at the Administration Building of the Panama Canal; that his attention was attracted to the 'bus which left the Administration Building at about 5:05, by the loud ringing of its gong; that from the point at the Administration Building at which he was standing he obtained a side
29 view of the bus as it was going down the hill; that he saw a colored boy who was on a bicycle riding down the road in front of the 'bus; that the 'bus driver rang his gong on the way down the hill; that the man on the bicycle weaved from one side of the road to the other and that the 'bus driver also went from one side of the road to the other; that he noticed Mr. Bosse in the middle of the road ahead of the bicyclist and the motor 'bus apparently looking down at something which he was carrying in his hands; that Bosse seemed to pay no attention to the oncoming 'bus and remained in the centre of the road; that the colored man was run into by the 'bus while he was on the right hand side of the road and that in order to prevent running over the colored man's body, the 'bus operator swerved his machine from the right of the road to the

left thereof and struck Mr. Bosse; that at this time Mr. Bosse was in the middle of the road; that he knows the rule of the road; that pedestrians in the vicinity of the Administration Building use both sides of the road; that at the time of the accident there were more people on the left of the road than on the right; that the distance from — he stood to the point at which Bosse was run over was approximately seven hundred feet.

Cross-examination of Mr. John S. Balmore:

That in spite of the fact that he was seven hundred feet away from the scene of the accident, he could plainly see all the things to which he has testified; that he is certain that Bosse was looking toward the ground as if he were reading or was looking at something in his hands; and that Bosse did not turn around to look at the oncoming 'bus.

Mr. F. E. Fletcher, the third witness called for the defendant company, after being duly sworn, testified as follows:

That he is an employee of the Panama Canal in the Mechanical Division; that on the afternoon of July third, he took passage at the Administration Building in the 'bus that left there at 5:03 for Ancon; that the 'bus was crowded, for which reason he remained at the front of the 'bus near the cash register, and at the driver's left side, facing in the direction in which the bus was going; that the bus's entire front is of glass and that he could see the road and everything in the road, that the 'bus in going down the hill was not going in excess of fifteen miles per hour; that a negro on a bicycle was riding down the road in front of the 'bus and at about the same rate of speed; that the bicyclist was winding from one side of the road to the other in order to avoid hitting pedestrians who were on both sides of the road and who were going from the Administration Building toward Ancon; that the 'bus operator kept ringing his bell from the time the negro was first seen by him; that the negro kept looking back over his shoulder at the 'bus, but made no effort to get out of its way and enable it to pass; that the 'bus operator ran off the right hand side of the road into the grass at which time the negro also veered to the right and thus kept in front of the 'bus; that the chauffeur then turned to the left and the negro also turned to the left, and that in or near the centre of the road the 'bus collided with the negro, throwing him off his bicycle onto the ground; that the collision resulted in smashing the glass on the headlight of the 'bus; that at this time Mr. Bosse was ahead of the vehicle, on the right hand side of the road, walking in the direction of Ancon; that when Bosse heard the crash of the collision, he stopped and walked toward the centre of the road looking back toward the 'bus; that at this time Mr. Bosse was twenty-five or thirty feet from the oncoming 'bus, but seemed dazed and made no effort to get out of the way; that as the 'bus drew near Bosse he jumped toward the left of the road and nearly cleared the 'bus, but the oncoming 'bus going toward the

middle of the road ran him down; that no one appeared to pay much attention to Bosse after the negro had been struck as he appeared to be in a safe position; that he positively knows that the chauffeur was ringing the bell; that Mr. Bosse, when he first
31 noticed him, was walking along the edge of the road on the grass-plot on the right side of the road.

Cross-examination of Mr. F. E. Fletcher:

That Bosse left the grass plot on the right of the road; went to the centre of the road, and got into the way of the oncoming 'bus; that Bosse was looking at something in his hand and apparently paying no attention to the 'bus; that he looked over his left shoulder at the bus when it approached him; and when it was near him stopped right in front of the 'bus.

Mr. L. L. KIRKBRIDE, the last witness called for the defendant company after being duly sworn, testified as follows:

That he is a motor 'bus operator in the employ of the Panama Railroad; that on the afternoon of July third, at 5:03, he left the Administration Building for Ancon with a load of thirty-three passengers aboard; that in leaving the building he noticed a negro ahead of him riding on a bicycle; that the negro was weaving from one side of the road to the other; that when first nearing the negro he was on the left side of the road; that the negro then went to the left side also; that in the meantime he was ringing his bell and kept ringing it; that the negro then went to the right of the road and crossed again toward the left, remaining for a time in the center thereof; that he believed that the negro intended to permit him to pass with his 'bus, but that as he attempted to do so the negro swerved again to the left and caused the 'bus to run into him; that the negro was knocked off his bicycle and thrown toward the right of the road, and that in attempting to prevent running over the negro's body he swerved his machine to the left at which time he suddenly saw Mr. Bosse and ran into him; that he did not see Bosse until the moment that he struck him for the reason that people were crowded closely around him in the 'bus;
32 that at no time was he driving at a greater rate than ten miles per hour and that while following the negro he reduced his speed very considerably; that he rang his bell all the way down the hill; that he knows the rule of the road and thinks that the rule applied to pedestrians as well as to vehicles, that it is generally observed by pedestrians; that he is twenty-one years of age and has been a chauffeur ever since he was fifteen years old; that he comes from San Antonio, Texas, and has always been considered an A number 1 chauffeur; that he does not know the weight of a loaded 'bus, but would guess it to be in the neighborhood of five tons.

Cross-examination of Mr. L. L. Kirkbride:

That he has been in the employ of the Panama Railroad Company since May 8, 1916; that he passed his chauffeur's examination and was granted a license by the Canal Zone authorities; that his experience as a driver covered everything from Fords to five ton trucks; that he was not given any specific instructions relative to the operation of motor 'buses by the defendant company; that the buses are operated on schedules which allow him twelve minutes to go from the Administration Building to the Tivoli Hotel, including stops; that there are no speedometers on the buses.

Thereafter the defendant company rested its case;

And plaintiff, in rebuttal, called

Mr. GEORGE SHAEFFER, who after being duly sworn, testified as follows:

That he is employed as a clerk by the Panama Canal in the Administration Building; that on the afternoon of July third, at about 5:03 he boarded a Panama Railroad motor 'bus at the Administration Building and took a seat in the extreme rear of the 'bus; that in leaving the Administration Building and starting down the hill, the motor 'bus was going at a pretty "fast clip"; that when it arrived near the bottom of the hill, he felt the 'bus swerve rather sharply to the right; that thereafter the 'bus stopped and in looking out he saw Mr. Theodore Bosse ten or fifteen feet to the rear of the 'bus; that he saw neither the colored man nor Bosse prior to the occurrence; Mr. Bosse, when he saw him, was lying about in the middle of the road; that he heard no bell or warning signal being given by the 'bus while going down the hill.

33

Cross-examination of Mr. George Shaeffer:

That he cannot say that no bell was being sounded by the bus operator while going down the hill; that he did not hear a bell; that he does not know the weight of one of the 'busses, but knows that they are very heavy.

Whereupon plaintiff announced that he had concluded his case.

And thereafter counsel for the defendant company moved the Court to direct the jury to return a verdict for the defendant; for the reason that upon the case as presented by both plaintiff and defendant it was conclusively shown that the defendant company was not negligent; that the plaintiff himself was negligent in that he was upon the side of the road other than the one the law required him to be on; furthermore, that the evidence clearly showed that the antics of the colored man upon the bicycle and his negligence was the proximate cause of Mr. Bosse's injuries; that this

intervening cause was the proximate cause of the accident and was, as a matter of law, such negligence as would insulate any negligence which the defendant company might have been guilty of.

The Court overruled the aforementioned motion for a directed verdict for the defendant company, to which ruling an exception was saved.

34 Thereafter arguments of counsel were addressed to the Court and jury.

At the conclusion of the aforementioned arguments, counsel for the defendant company requested the Court to charge the jury that the physical pain and suffering endured by plaintiff as a result of his injuries constituted no element of damages under the laws of the Canal Zone.

The Court overruled said motion to instruct the jury, to which ruling an exception was taken by defendant company's counsel.

Whereafter the Honorable Court instructed the jury as follows:

"GENTLEMEN OF THE JURY: This is an action in which the plaintiff seeks to recover from the Panama Railroad Co. a corporation, damages in the sum of $10,000 on account of an injury which he received July 3, 1916, about 5 o'clock in the afternoon of that day, and which injury he claims was the result of the carelessness and negligence on behalf of the defendant. Plaintiff states in his complaint that defendant was operating a motor bus from the Administration Building in Balboa Heights to and from the Tivoli Hotel, and that on that afternoon the motor bus operated by the chauffeur in the employ of the defendant came from the Administration Building along the Balboa road at a high rate of speed, in excess of 20 miles an hour, and without warning negligently struck plaintiff and knocked him down, the wheels of the bus passing over him and crushing the right foot and breaking the bones thereof, and causing him such severe injury that he was removed to the Ancon hospital for treatment where he has been under the care of doctors up to and including the present date, and where it became necessary to remove the second toe of his right foot as the direct and proximate result of the injury caused, as he claims by reason of the negligence and carelessness of the defendant. There is the further allegation that at the time of the injury there were

35 a large number of people on the road, including women and children. That the chauffeur was driving so negligently, carelessly and unlawfully as to injure the plaintiff in the manner and form aforesaid, and that the injury was due wholly and exclusively to the negligence of the defendant, and that plaintiff in no way contributed to said injury. The answer of the defendant constitutes a general denial. There is, however, an admission in open Court that the bus belonged to the Panama Railroad Company and was being operated by it.

"In the first place, I will say that the negligence, if any, of the driver of that bus at that time must be regarded in the law as the negligence of the company itself; so that the company would be liable for any negligence of the driver at that time. A corporation is an invisible person that acts only thru servants, agents

and employees, and in and about the performance of the duties entrusted to those agents the corporation is liable therefor just as any person or individual is liable for the acts of his agents. The question for you to consider is whether or not there was negligence on the part of the driver of that bus which resulted in the injury; if so, the defendant is liable therefor, and your verdict should be accordingly. And if there was no negligence your verdict should be accordingly for the defendant because if the injury to plaintiff was the result of an accident, without negligence on the part of the defendant, it would not be liable. This brings me to say:

"Negligence is never assumed; never presumed. The law does not presume that there was negligence merely from the fact that there has been an accident—a collision—with a resulting injury. There are causes where negligence is presupposed from the very nature of the thing; where there is a derailment of a train and a passenger is hurt by reason of the derailment; or if the bus had overturned and a passenger inside had been hurt, then these would raise in the eyes of the law a presumption of negligence which would put the burden of proof on the defendant to remove the same. In this case there is no such presumption of negligence,
but that plaintiff must establish negligence affirmatively on
36 behalf of the defendant and that by a fair preponderance of the evidence. Now let there be no confusion in your minds as to the expression the 'fair preponderance of the evidence.' There is nothing mysterious about that expression. It is a legal expression. It simply means that character or quality of evidence that carries the greatest conviction to your minds. If viewed in that light you find the defendant *guilty* [guilty] of negligence in and about the manner of operating the automobile thru its agent at that time, and also that such negligence was the proximate cause of the injury then the defendant is liable and your verdict should be accordingly. And in considering the preponderance of evidence, I will say, the preponderance of evidence does not necessarily depend on the number of witnesses one way or the other. The jury is the absolute judge of the facts in this case. The duty and responsibility remain in your hands. While the Court will give you the law, the duty is for you to pass upon the facts; to shift it, to weigh*t* it and to put yourselves in the position of the parties at that time and place. You have the right, if you want to, to believe one man as against two or against three or a half dozen, just as in the ordinary course of life. You may consider what bias or interest, if any, they may have in the matter. And, on the contrary, you may say, 'here is one man I believe, his manner is such, his opportunities are such, his intelligence is such, that I believe him as against all the others.' The burden may be established by one as against a half dozen. On the other hand, the case of the defendant may be established by the testimony of one as against many. Look at the burden of proof by the character and quality of evidence that carries the greatest amount of conviction to your minds. The facts of the case, according to the plaintiff's testimony, indicate that this car was running somewhat fast, and

that it was not ringing its bell and not giving any warning, and that by reason of that this plaintiff, walking along the road, was injured. The rights to the use of the street are for all. No automobile, no carriage, has superior rights in the street to the pedestrians. He has the same equal rights. Each one must so
37 use his rights, [destrian and driver of automobile or coach, as not to unnecessarily interfere with the rights of the other. A person operating an automobile or car is bound to operate it with an ordinary degree of care. If he fails in the exercise of such ordinary degree of care, such care as a man of ordinary skill and prudence would exercise, and injury results, he is guilty of negligence. As to the question of 'ordinary care': There is no mystery about that either. Ordinary care is that care that an ordinarily careful, prudent man should exercise, under the same or similar circumstances. It is the care *than* [that] an ordinarily prudent, careful man must take commensurate with or proportioned to the probability of injury that may result if he fails to exercise it. For instance: In operating a highly explosive machine he must exercise great care. A man driving a tame horse does not have to exercise the same care as a man operating a heavy automobile, or other conveyance very heavy and fraught with much danger. Ordinary care is always the same, and yet it varies according to the circumstances. The circumstances in one case require more diligence to meet the measure of ordinary care than in another. It is always proportioned to or commensurate with the probability of danger to others. Plaintiff claims that this very heavy car was running down hill, and that this imposed upon defendant the obligation to be very careful, not to exceed the speed limit, and to use every reasonable caution to keep the car under such control as to prevent injury. You have heard that there is a regulation that prohibits operating an automobile at a rate of speed in excess of 8 miles an hour in the city and over crossings, and curves, and 15 miles in the country. That is true. But that is a municipal regulation. That doesn't necessarily establish the rights of individuals as between themselves. For instance: A man might be driving a car in the country over a road perfectly clear, and he might operate at a higher rate than 15 miles. He would be guilty of a violation of the law as between him and the government and might be fined for it, and yet he might
38 not be guilty of negligence so far as individuals are concerned. He might say the chances are that nobody will be around here for an hour. 'I will take chances violating the law, but I do not see the possibility of injuring anybody,' and so it might not be negligence. *Ne* [He] might not be guilty of negligence altho he violated the law. On the other hand, the fact that the law says he cannot go faster than 8 miles does not entitle him to go 8 miles always if he sees that by so doing he might cause injury to somebody else. If he sees a child playing in the road, a lame person, an infirm person ahead of him, the law does not mean anything so absurd as that he can keep on going 8 miles an hour and run into him. Suppose a procession in Broadway, New York, or a procession in any place, it isn't contended for a moment

that a tramway could keep on at a lawful rate of speed and run into them. It is for you to find the facts in this case. In the first place: were they exceeding the speed regulations? Plaintiff claims first, a violation of the speed regulation going down hill, and also that it happened just about five minutes after closing when everybody was leaving work, and when the road was full of people. And, therefore, that that imposed upon the employe the duty of going very slowly, and not going up to the speed limit, and giving warning and sounding the gong, and keeping the automobile in such control that it could stop at any moment danger became apparent. That is the law. Where an automobile is using a crowded street the duty of those operating the machine is to use ordinary care to avoid a collision, which is necessarily fraught with danger, and to keep it under such control that they can stop reasonably. But while this is true the defendant interposes this defense that is proper for your consideration: That here was an intervening third cause; that this intervening cause was the result of the injury and that it was not due to the rate of speed at which it was going. This cause was that a colored man was riding a bicycle. He rode on one side, the right side, I believe, then over to the left side. The facts seemed to indicate that this man on the bicycle was dodging in and out among the people walking down hill, and he got over to the left hand side, when the driver, in order not to hit
39 him, moved over rapidly to the right side and struck the plaintiff. Where he struck him is in dispute. Some say in the middle of the road, some say the side, some say the grass plot. Anyhow their contention is that the presence of the colored man, moving in and out, was the proximate cause and that the injury would not have happened but for that. I will give you the law on that as written out." (The Court reading from paper):

'Judge Feuille for Deft.: In view of these authorities I will ask the Court to instruct the jury to direct a verdict for the defendant upon the evidence submitted by both sides.

Court: Motion overruled. Defendant's exception is saved.

Judge Feuille: 2nd; that the jury be instructed that the plaintiff is not entitled to recover for physical pain and suffering in this case. Your Honor understands my theory of that. It may be wrong.

Court: Motion overruled. Defendant's exception is saved.

Judge Feuille: I will ask that the Court instruct the jury that the burden is upon the plaintiff to establish the negligence of the defendant, and that it is not sufficient if that negligence only relates to the excess of speed of the buss unless the injury resulted from that excess of speed; was the proximate cause. That if the jury believe that the accident to Mr. Bosse resulted from the interposition of this independent agency, the colored man upon the bicycle, and that in the efforts of the chauffeur to prevent a collision with him, under the facts and circumstances as detailed by the witnesses, that the defendant is not liable.

40 "Court: If you say the injury resulted solely by reason of the action of the colored man on the bicycle in moving to

and fro, so that the injury was the result of that only, and that the negligence, if any, of the company had nothing to do with it, I will give it in that form.

"Judge Feuille: With the understanding that the burden of proof is upon plaintiff to show that the accident was due entirely to the negligence of the defendant.

"Court: If they believe it was solely the result of the intervening cause, and would not have happened but for that, then the defendant would not be liable.

"It is for you to say if the injury resulted solely by reason of the action of the colored man on the bicycle. If you find that the injury to this plaintiff; altho you may find defendant was negligent in the rate of speed he was running and in not ringing the bell; if you find that the injury to plaintiff was the result solely of some other intervening cause that came in, so that the intervening cause is solely responsible for it, and that the action of the defendant company itself was not a contributing cause to it in any way, and that the negligence, if any, of the defendant did not participate at all, but that it was wholly the result of some intervening cause, in that event I charge you the defendant is not liable and would be entitled to a verdict. That is a matter of fact for you to determine. On the contrary, if you find an intervening cause came in and that the injury to defendant was the result jointly of the intervening cause and the negligence of the defendant, then I charge you the defendant is liable.

"If you find for the plaintiff you will then consider the damages to which you consider he is entitled. When it comes to pain and suffering it is impossible to put that in dollars and cents as you would a contract; and yet pain and suffering is an element recognized by the law, and one left to the intelligent judgment and
41 discretion of honest, intelligent, American jurors. You are entitled to consider pain and suffering as an element of damages. You have heard what the doctor says: That the foot of plaintiff may not entirely recover within six months. You have the right to consider the loss of the toe of right foot as an element of damages. The loss of a member of the human body is proper for your consideration in this respect; that is, if you find for the plaintiff at all.

"Now as to pecuniary loss sustained, he has gone back to work at the same salary in the Timekeeper's office. On that score there would not seem to be any damages unless you should believe the injury is permanent and that in the future he would be compelled to abandon work, but I do not think the evidence on that score would justify it. As to the loss of 2 or 3 days from work. (Plaintiff's counsel here states there is no claim on this score.)

"The Court continuing said: There is no claim, gentlemen, on account of diminution of earning capacity. So then the damages, if any, would be limited to pain and suffering and to the physical injury sustained.

"Judge Feuille: I note exception to the portion of the charge relative to finding pain and suffering as an element of damages."

Counsel for defendant company entered an objection to that part of the Court's charge wherein it was stated that the physical pain and suffering endured by plaintiff as a result of the accident could be considered by the jury as an element of damages, which objection was by the Court overruled and to which ruling an exception was saved.

Thereafter, the jury retired to consider their verdict, and at 3:30 P. M. of the day of this trial returned into Court, in writing, their verdict, which verdict, omitting caption, reads as follows:

"We, the jury, on the ssues joined herein, find for the plaintiff, and assess his damages in the sum of $2,500.00."

42 Whereupon, counsel for the defendant company gave notice of a motion for a new trial, which said motion was duly filed on August 25, 1915, and omitting caption, reads as follows:

The Honorable William H. Jackson, Judge of the said Court:

Now come Frank Feuille and Walter F. Van Dame, Attorneys for the Panama Railroad Company, defendant herein, and respectfully ask the Court to set aside the verdict rendered by the jury in this case on the 19th inst., and grant the defendant a new trial for the following reasons, to wit:

First. Because the Court refused to direct a verdict for the defendant, upon the termination of the plaintiff's evidence as requested by defendant's counsel.

Second. Because the Court refused to direct the jury to bring in a verdict for the defendant upon the close of the evidence on behalf of the plaintiff and defendant, although requested so to do by defendant's counsel.

Third. Because the Court refused the request of defendant's counsel to instruct the jury that they should not consider physical pain and suffering as an element of damage in the case.

Fourth. Because the Court erred in instructing the jury to consider physical pain and suffering as an element of damage in the case.

Fifth. Because the verdict of the jury was contrary to the law and the evidence in the case.

I. It was contrary to the law, (*a*) because the evidence failed to show negligence on the part of the defendant; (*b*) the evidence clearly established the fact that the accident was due en-

43 tirely to an intervening cause, to wit; the action of the colored bicyclist, who obstructed the rightful passage of the omnibus, and that the defendant's chauffeur was without fault; (*c*) because there was no evidence tending to prove pecuniary damages of any kind.

II. The verdict was contrary to the evidence, which clearly established that the accident was not due to the negligence of the defendant's chauffeur.

Sixth. Because the verdict of the jury is excessive.

Premises considered, defendant respectfully prays that the verdict herein rendered by the jury be set aside, and that a new trial be granted.

Thereafter, to-wit: on August 26, 1916, arguments of counsel for the respective parties having been heard by the Court on said motion for a new trial, the defendant company's said motion was overruled, to which ruling counsel for defendant company saved an exception.

Whereupon the Court ordered the entry of judgment in the sum of two thousand five hundred dollars ($2,500.00) in favor of the plaintiff and against the defendant company, together with costs; counsel for the defendant company thereupon objected to said judgment, and their objection having been by the Court overruled, exception was noted; and the Court thereupon gave said defendant company fifteen days within which to file its bill of exceptions, which time was subsequently, to-wit on September ninth, nineteen hundred and sixteen, extended an additional period of ten days.

And thereafter, on the 19th day of September, nineteen hundred and sixteen, counsel for the defendant company filed the foregoing bill of exceptions.

Now, therefore, the defendant company, by counsel, here tenders to the Court the foregoing bill of exceptions to the Court's rulings in this case, which bill of exceptions contains all the material
44 facts adduced by the parties on the trial of this cause, and defendant respectfully asks that the foregoing statement of facts and bill of exceptions be approved by the Court and made a part of the record of this cause.

Respectfully,

FRANK FEUILLE,
WALTER F. VAN DAME,
Attorneys for Defendant.

UNITED STATES OF AMERICA,
Canal Zone, ss:

The plaintiff, by his attorneys, Messrs. Theodore C. Hinckley and Stevens Ganson, hereby agrees that the foregoing statement of facts and bill of exceptions contains all the material facts adduced by the parties on the trial of the herein cause, as well as a correct record of all the objections made and exceptions saved by both parties to this suit; and said plaintiff, by his attorneys, hereby requests the Court to approve the foregoing statement of facts and bill of exceptions, and to make same a part of the record of this cause.

(Sgd.) THEODORE C. HINCKLEY,
(Sgd.) STEVENS GANSON,
Attorneys for Plaintiff.

Approved and ordered filed and made part of record. 9/19/1916.
(Sgd.) WM. H. JACKSON, *Judge.*

Attest:
[SEAL.] E. M. GOOLSBY, *Clerk.*

45 *Petition for Writ of Error and Supersedeas.*

UNITED STATES OF AMERICA,
Canal Zone:

In the District Court of the Canal Zone, Division of Balboa.

Civil. No. 119.

THEODORE BOSSE, Plaintiff,

vs.

THE PANAMA RAILROAD COMPANY, a Corporation, Defendant.

Petition for Writ of Error and Supersedeas.

Comes now the defendant company, by Frank Feuille and Walter F. Van Dame, its counsel, and feeling itself aggrieved by the judgment of the Court in the above-styled and numbered cause, entered on the twenty-sixth day of August, nineteen hundred and sixteen, and in which cause the defendant company's motion for a new trial had, on the aforementioned date, been overruled,—petitions the Honorable Court for an order allowing said defendant company to prosecute a writ of error to the United States Circuit Court of Appeals for the Fifth Circuit, and that upon giving and furnishing security in the amount of $3,500.00 which is the sum as was fixed by the Honorable Court on the thirty-first day of August, nineteen hundred and sixteen, all further proceedings in this Court be suspended and stayed until the determination of the said writ of error by the said United States Circuit Court of Appeals for the Fifth Circuit.

Respectfully,

(Sgd.) FRANK FEUILLE,
(Sgd.) WALTER F. VAN DAME,
Counsel for Defendant.

Filed Sept. 20th, 1916.

46 *Assignment of Errors.*

UNITED STATES OF AMERICA:

In the United States Circuit Court of Appeals for the Fifth Circuit.

THE PANAMA RAILROAD COMPANY, a Corporation, Plaintiff in Error,

vs.

THEODORE BOSSE, Defendant in Error.

Assignment of Errors.

Comes now the Panama Railroad Company, plaintiff in error, by its counsel, Frank Feuille and Walter F. Van Dame, and files the

following assignment of errors on which it will rely upon its prosecution of the writ of error in the above entitled cause:

I. The trial Court erred in overruling the plaintiff in error's demurrer to the amended complaint, which demurrer was based on the grounds therein set out, and to which ruling and exception was duly saved by counsel for plaintiff in error;

II. The trial Court erred on overruling plaintiff in error's motion for a directed verdict at the conclusion of defendant in error's case, which motion was based on the following grounds:

That defendant in error had shown no negligence on the part of the plaintiff in error and that defendant in error had failed to show that the direct and proximate cause of his injuries were the result of any negligence on the part of plaintiff in error; furthermore, that all the testimony of defendant in error's witnesses indicated that the conduct and negligence of the negro on the bicycle was the direct and proximate cause of defendant in error's injuries; and that as a matter of law, the negro's negligence—his negligence being
47 the proximate cause of the accident,—insulated any negligence that plaintiff in error's servant might have been guilty of;

and to which ruling an exception was duly saved by counsel for plaintiff in error;

III. The trial Court erred in overruling plaintiff in error's motion for a directed verdict on the evidence adduced on behalf of both defendant in error and plaintiff in error, which motion was based on the following grounds:

That the evidence showed that plaintiff in error was not negligent; that defendant in error himself was negligent in that he was upon the side of the road other than the one the law required him to be on; furthermore, that the evidence clearly showed that the antics of the colored man upon the bicycle and his negligence was the proximate cause of defendant in error's injuries; that this intervening cause was the proximate cause of the accident and was, as a matter of law, such negligence as would insulate any negligence which plaintiff in error's servant might have been guilty of;

and to which ruling an exception was duly saved by counsel for plaintiff in error;

IV. The trial Court erred in overruling plaintiff in error's motion to the effect that the jury be instructed that the physical pain and suffering endured by defendant in error as a result of his injuries constituted no element of damages under the laws of the Canal Zone, to which ruling an exception was duly saved by counsel for plaintiff in error;

V. The trial Court erred in overruling the objection entered by counsel for plaintiff in error to that part of the Court's charge to the jury wherein the Court said:

"When it comes to pain and suffering, it is impossible to put that

in dollars and cents as you would a contract; and yet *paid*
48 [pain] and suffering is an element recognized by the law, and one left to the intelligent judgment and discretion of honest, intelligent, American jurors. You are entitled to consider pain and suffering as an element of damages."

which objection was based on the ground that physical pain and suffering does not constitute an element of damages under the laws of the Canal Zone, and to which ruling an exception was duly noted by counsel for plaintiff in error;

VI. That the trial Court erred in overruling plaintiff in error's motion for a new trial, which was based on the following grounds:

1. Because the Court refused to direct a verdict for plaintiff in error upon the termination of defendant in error's evidence, as requested by plaintiff in error's counsel;

2. Because the Court refused to direct the jury to bring in a verdict for the plaintiff in error upon the close *if* [of] the evidence on behalf of the defendant in error and the plaintiff in error, although requested to do so by plaintiff in error's counsel;

3. Because the Court refused the request of plaintiff in error's counsel to instruct the jury that they should not consider physical pain and suffering as an element of damage in the case;

4. Because the Court erred in instructing the jury to consider physical pain and suffering as an element of damage in the case;

5. Because the verdict of the jury was contrary to the law and the evidence in the case;

It was contrary to the law, (*a*) because the evidence failed to show negligence on the part of the plaintiff in error; (*b*) the evi-
49 dence clearly established the fact that the accident was due entirely to an intervening cause, to wit: The action of the colored bicyclist, who obstructed the rightful passage of the omnibus, and that the plaintiff in error's chauffeur was without fault; and (*c*) because there was no evidence tending to prove pecuniary damages of any kind;

The verdict was contrary to the evidence which clearly established that the accident was not due to the negligence of plaintiff in error's chauffeur.

6. Because the verdict of the jury is excessive.

and to which ruling an exception was duly saved by counsel for plaintiff in error;

VII. The trial Court erred in overruling plaintiff in error's objection to the judgment entered in favor of defendant in error and against plaintiff in error, which judgment was based on the verdict of the jury, and to which ruling an exception was duly saved by counsel for plaintiff in error;

Wherefore, Plaintiff in error prays that the judgment of the District Court of the Canal Zone for the Division of Balboa herein be reviewed by the United States Circuit Court of Appeals for the Fifth

Judicial Circuit and that the said judgment be reversed and the cause remanded for a new trial.

(Sgd.) FRANK FEUILLE,
(Sgd.) WALTER F. VAN DAME,
Counsel for Plaintiff in Error.

Filed Sept. 20th, 1916.

50 *Order Allowing Writ of Error.*

UNITED STATES OF AMERICA,
Canal Zone:

In the District Court of the Canal Zone for the Division of Balboa.

Civil. No. 119.

THEODORE BOSSE, Plaintiff,

vs.

THE PANAMA RAILROAD COMPANY, a Corporation, Defendant.

Order Allowing Writ of Error.

Upon motion of Frank Feuille and Walter F. Van Dame, counsel for the defendant company, and upon filing a petition for writ of error and an assignment of errors, it is ordered that writ of error be and hereby is allowed, to have reviewed by the United States Circuit Court of Appeals for the Fifth Circuit, the judgment heretofore entered herein on the twenty-sixth day of August, nineteen hundred and sixteen, and that the amount of the bond on said writ of error be and is the sum of $3,500.00;

And it is further ordered that citation in error issue to the said Theodore Bosse, plaintiff herein.

(Sgd.) WM. H. JACKSON, *Judge.*

Attest:

(Sgd.) E. M. GOOLSBY, *Clerk.*

Filed Sept. 20th, 1916.

51 *Bond on Writ of Error.*

UNITED STATES OF AMERICA, *Canal Zone:*

In the District Court of the Canal Zone for the Division of Balboa.

Civil. No. 119.

THEODORE BOSSE, Plaintiff,

vs.

THE PANAMA RAILROAD COMPANY, a Corporation, Defendant.

Bond on Writ of Error.

Whereas, a judgment was rendered on the twenty-sixth day of August, nineteen hundred and sixteen, in the above-styled and numbered case, in the said District Court of the Canal Zone for the Division of Balboa in the sum of two thousand five hundred dollars, and all costs, in favor of the plaintiff, Theodore Bosse, and against the defendant, The Panama Railroad Company, and the Court having, theretofore, on the same date overruled defendant company's motion for a new trial, and said defendant company having been granted a review of the said judgment by the United States Circuit Court of Appeals for the Fifth Circuit by writ of error, and the said defendant having been required to execute and file a bond on said writ of error in the sum of three thousand five hundred dollars, ($3500.00), in the terms of the law, in order that execution of the said judgment might be stayed;

Now, therefore, the Panama Railroad Company, defendant, as principal and C. A. McIlvaine, as surety, acknowledge themselves jointly and severally indebted to Theodore Bosse, the plaintiff in said suit, in the full sum of three thousand five hundred dollars, upon the condition that the said defendant, the Panama Railroad Company, shall prosecute its said writ of error to effect and answer all damages and costs if it shall fail to make the plea good.

52 Witness our hands this 13th day of September, nineteen hundred and sixteen.

THE PANAMA RAILROAD COMPANY, *Defendant,*

(Sgd.) By S. W. HEALD,
Its Superintendent.

(Sgd.) C. A. McILVANE, *Surety.*

Approved:

(Sgd.) WM. H. JACKSON,
District Judge of the Canal Zone.

Attest:

(Sgd.) E. M. GOOLSBY,
Clerk of Court.

Filed Sept. 20th, 1916.

Citation on Writ of Error.

UNITED STATES OF AMERICA, *ss:*

Citation on Writ of Error.

The President of the United States to Theodore Bosse and Messrs. Theodore C. Hinckley and Stevens Ganson, His Attorneys, Greetings:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Fifth Circuit, to be held at the City of New Orleans, in the State of Louisiana, within thirty days from the date of this writ, pursuant to a writ of error filed in the Clerk's Office of the District Court of the Canal Zone for the Division of Balboa, wherein the Panama Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

53 Witness, the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States of America this 20th day of Sept., nineteen hundred and sixteen, and the Independence of the United States the one hundred and fortieth.

(Sgd.) WM. H. JACKSON, *Judge.*

Attest:

(Sgd.) [SEAL.] E. M. GOOLSBY, *Clerk.*

I have this day served the above Citation on Writ of Error, at Ancon, Canal Zone, on Stevens Ganson, a member of the firm of Hinckley and Ganson, attorneys for Theodore Bosse, by delivering to him a copy of the same.

(Sgd.) WM. H. MAY,
Marshal for the District of the Canal Zone.

Dated this twentieth day of September, 1916.

Filed Sept. 20th, 1916.

* * * * * * *

54 *Certificate of Clerk.*

I, E. M. Goolsby, Clerk of the District Court of the Canal Zone, do hereby certify that the foregoing 26 pages with insert, contain a true and correct copy of the proceedings and orders authorizing the prosecution of a writ of error to the United States Circuit Court of Appeals for the Fifth Circuit in the above styled cause; and I further certify that the foregoing 26 pages, with insert, contain a

true and complete transcript of all the material proceedings had upon the trial of the said cause in the District Court of the Canal Zone up to the suing out of the writ of error aforesaid.

In witness whereof, I have hereunto set my hand and the seal of this Court on this 20th day of September, A. D. 1916.

[SEAL.] E. M. GOOLSBY,
Clerk District Court of the Canal Zone.

55 That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and Submission.

Extract from the Minutes of January 23d, 1917.

No. 3015.

PANAMA RAILROAD COMPANY
versus
THEODORE BOSSE.

On this day this cause was called, and, after argument by Frank Feuille, Esq., for plaintiff in error, and Stevens Ganson, Esq., for defendant in error, was submitted to the Court.

Opinion of the Court.

Filed February 5th, 1917.

United States Circuit Court of Appeals, Fifth Circuit.

No. 3015.

PANAMA RAILROAD COMPANY, Plaintiff in Error,
vs.
THEODORE BOSSE, Defendant in Error.

Error to the District Court for the Canal Zone.

Before Pardee and Walker, Circuit Judges, and Grubb, District Judge.

By the COURT:

Memorandum by Pardee, Judge.

This suit was brought in the court below under Section 2341 of the Civil Code of the Republic of Panama, in force in the Canal

Zone, reading as follows: "He who shall have been guilty of
56 an offense or fault, which has caused another damage, is obliged to repair it, without prejudice, to the principal penalty which the law imposes for the fault or offense committed."—to recover damages from the Panama Railroad Company on the following state of facts:

The plaintiff in error, a corporation organized under the laws of the State of New York, was operating motor-busses between the town of Balboa and the city of Panama in the month of July, 1916, and in the afternoon of the 3rd day of that month a motor-bus of plaintiff in error, while being driven by the chauffeur in charge, an employe of the plaintiff in error, at a rate of speed in excess of twenty miles per hour in the public highway in the town of Balboa, without warning, struck defendant in error and knocked him down, the wheels of the motor-bus passing over him, crushing his right foot, breaking the bones thereof, and causing him such severe injury that he was forthwith removed to the Ancon hospital for treatment. Defendant in error was struck by the motor-bus on a public highway which, at the time, was filled with pedestrians including women and children. There were no side-walks on either side of the road. As a result of the injury defendant in error suffered the loss of the second toe of the right foot from which no permanent injury will result to cause him any diminution of his capacity to earn a livelihood.

The complaint filed in the case alleged the violation of the speed order promulgated by the Executive of the United States February 28, 1912, and also alleged confinement in hospital for a considerable length of time, and that complainant had suffered physical damage, and in mind and health by pain and suffering.

To this complaint, the defendant below interposed a demurrer on the ground that the same does not state facts sufficient to constitute a cause of action and especially to all that part of
57 plaintiff's complaint wherein mental and physical pain and suffering are set up as an element of damages.

This demurrer was overruled, trial was had before a jury resulting in a verdict of $2,500.00, and judgment being rendered thereon, motion was filed for a new trial, which was overruled; whereupon defendant below sued out this writ of error.

The assignments of error cover the overruling of the demurrer, the refusal of the court to direct a verdict in favor of the defendant, and the overruling of a charge that the jury be instructed that the physical pain endured by the defendant in error as the result of his injuries constitute no element of damages under the laws of the Canal Zone, and that the Court erred in overruling the plaintiff's motion for a new trial.

On consideration of the record, we conclude that the demurrer to the complaint was properly overruled. The main contention on that ground is that the Railroad Company was not responsible for the acts of negligence of its employes resulting in injury to others.

Corporations act only through agents and every act of an au-

thorized agent within the scope of his employment is therefore the act of the company.

Under the jurisprudence of the Canal Zone, and we think a proper interpretation of Sections 2341 and 2356, damages for physical pain and suffering are recoverable.

While the objection that the verdict was excessive is insisted upon in this court, we find nothing in the record in the way of facts to justify our interference therewith.

On the whole record we find no reversible error assigned or patent, and

The judgment of the District Court of the Canal Zone is affirmed.

58 *Judgment.*

Extract from the Minutes of February 5, 1917.

No. 3015.

PANAMA RAILROAD COMPANY

versus

THEODORE BOSSE.

This cause came on to be heard on the transcript of the record from the District Court of the Canal Zone, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause, be, and the same is hereby, affirmed;

It is further ordered and adjudged that the plaintiff in error, Panama Railroad Company, and the surety on the writ of error bond herein, C. A. McIlvaine, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

Petition for Writ of Error and Order Allowing Same.

Filed May 7th, 1917.

In the Supreme Court of the United States.

Number 3015.

PANAMA RAILROAD COMPANY, a Corporation, Plaintiff in Error,
vs.
THEODORE BOSSE, Defendant in Error.

Petition for Writ of Error to the United States Circuit Court of Appeals for the Fifth Circuit.

59 To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner Respectfully Represents:

1. That your petitioner is a corporation under the laws of the State of New York and engaged in business of owning, operating and controlling a railroad in the Republic of Panama and also engaged as a common carrier of passengers for hire by motor bus between the town of Balboa Heights, Canal Zone and the City of Ancon in the Canal Zone, said last mentioned business being operated by your petitioner independently of its business as a common carrier by railroad.

2. That the defendant in error is a resident of the City of Balboa Heights, Canal Zone.

3. That on the 12th day of July, 1916, said defendant in error filed his complaint in the District Court of the Canal Zone, Balboa Division, praying judgment against your petitioner for the sum of ten thousand dollars ($10,000.00) for damages alleged to have been sustained by him by reason of being struck by a motor bus operated by an employee of your petitioner, then alleged to have been operated by said employee in a negligent, unlawful and reckless manner and at an unlawful and reckless rate of speed.

4. That to said complaint and amended complaint filed in said suit, your petitioner demurred, its demurrer being overruled whereupon your petitioner filed its answer and after a trial by jury on the 19th day of August, 1916, a verdict for the sum of twenty-five hundred dollars ($2,500.00) was rendered, and on the 26th day of August, 1916, your petitioner's motion for a new trial was overruled by the Court and judgment entered on said verdict in favor of the plaintiff in said suit, and against this petitioner for the sum of twenty-five hundred dollars ($2,500.00) and costs.

5. Your petitioner further states that by its aforesaid demurrer and by objections duly reserved during the trial of said case,
60 your petitioner asserted:

First. That under the law of the Canal Zone as defined by

the President of the United States by his executive order promulgated May 9, 1904, under the authority of the Act of Congress approved April 28, 1904, entitled "An Act for The Temporary Government of the Canal Zone of Panama, the Protection of the Canal Works, and for Other Purposes" (33 Stat. at L. 429), and by virtue of the Act of Congress approved August 24, 1912, the liability of your petitioner was not to be determined in accordance with the common law rules but by the law of Panama as it existed on May 9, 1904, and therefore your petitioner, a corporation, was not responsible in damages for the independent wrongful act of its employee in the commission of the injury, and

Second. That under the laws established by the aforesaid executive order and statutes your petitioner was not responsible to the said plaintiff in damages for the mental and physical pain and suffering claimed in said complaint and submitted by the Court to the jury as an element of damage in the instructions of the Court to said jury and to the overruling of these objections, executions were duly noted.

6. Your petitioner states that in the Executive Order of the President of the United States issued pursuant to the authority granted to the President by the aforesaid Act of Congress of April 28, 1904, it is stated:

"The municipal laws of the Canal Zone are to be administered by the ordinary tribunals substantially as they were before the change. * * * The laws of the land with which the inhabitants are familiar, and which were in force on February 26, 1904, will continue in force."

The order then makes an exception in respect to "certain great principles of government which have been made the basis of our existence as a nation and which we deem essential to the rule
61 of law" enumerating the proposition of organic Constitutional law familiar to Americans including the due process of law clause of the Constitution and other similar provisions.

7. That by Section 8 of the aforesaid Panama Canal Act of August 24, 1912, it is provided that the District Court created by that Act shall have jurisdiction on all matters and proceedings then within the jurisdiction of the Supreme Court, Circuit Court, and District Court of the Canal Zone, and it is further provided by Section 9 of said Act "that all existing laws in the Canal Zone governing practice and procedure in existing courts shall be applicable and adapted to the practice and procedure in the new courts," and the purpose and effect of said Act, with respect to the provisions of substantive law to be enforced in said Canal Zone, was to confirm the authority and right there-fore given the President of the United States by the Act of April 28, 1904, supra.

8. Your petitioner further states that the truth of its contention as to the substantive law of Panama which said Court erroneously failed to apply in this case is shown by the following review of its statutes and decisions: Prior to the year 1860, substantive law in the State of Panama was to be found in certain laws of Spain designated "Siete Partidas" under which responsibility for the commission of

a tort was personal, and the doctrine of respondeant superior was not recognized. This law provided:

"Law III, Title XXV, Partida VII—He who causes the damages shall make repairs to the one receiving the damage, and this can be required of anyone who had done the damage with his own hands or caused it by his fault, command or counsel."

9. In the year 1860, the State of Panama adopted a Civil Code, which contained the provisions of substantive law of that state including the present Canal Zone, and was in force until the year 1887. Articles 2442 and 2448 of said Code of the State of Panama were identical in terms with Articles 2341 and 2349 of the
62 National Code of Columbia, which although adopted by the Republic of Columbia in 1873, did not become the law of the State of Panama until the year 1887, and said last mentioned Sections, which constituted part of the existing statutory law of Panama on May 9, 1904, including also Article 2347 pertaining to the same subject, provide as follows:

"Article 2341. He who has committed an offense or fault resulting in injury to another is obliged to indemnify him, without prejudice to the principal penalty that the law may impose for the fault or offense committed.

"Article 2347. Every person is responsible, not only for his own actions, for the purpose of indemnifying the injury, but for the acts of those that are under his charge as well.

"So the father, and in *the fault* of the father, the mother is responsible for the acts of the minor children who inhabit the same house. So the tutor or curator is responsible for the conduct of the pupil who lives under his dependency and care.

"So the conductors of colleges and schools respond for the acts of pupils while these are under their care, and the artisans and empresarios (persons in charge of an enterprise), of the acts of apprentices and dependents (dependientes) in the same case.

"But the responsibility of such persons shall cease if, with the authority and care conferred upon and prescribed for them in their respective capacities they could not have prevented the act.

"Article 2349. The masters respond to the damage caused by their domestics and servants, done in the performance of service from the latter to the former; but they shall not be responsible if it shall be proven or if it appears that on such occasion the domestics or servants have comported themselves in an improper manner, that the masters had no means to foresee or impede the act
63 by the use of ordinary care or competent authority; in this case all of the responsibility for the injury shall fall upon the said domestics and servants."

Your petitioner further states that the said existing law of May 9, 1904, had received specific construction prior to that date by certain decisions of the Supreme Court of Columbia as well as by the Superior Court of the State of Panama:

In the case of Ramirez vs. The Panama Railroad Company, decided by the Superior Tribunal of Panama, January 28, 1886, and affirmed March 18, 1887 by the Supreme Court of Justice of Colum-

bia, one Smith, conductor of a train of the Panama Railroad Company had ejected and seriously injured a passenger who had failed to procure a ticket. The Court quoted a portion of the foregoing sections and held that the conductor of the train was, under the law, an "employee" and not a "dependent" for whose acts another may be absolutely responsible, and that the Railroad Company was not responsible in damages for the injury stating:

"The unforeseen and unpremeditated occurrence which took place between Conductor C. Smith and Felipe Ramirez can not give rise to the charge of gross fault, ordinary fault, or slight fault; (culpa lata, leve o levisima) against the transportation empresarios. A quarrel, a provocation on the part of a recognized passenger, or any other accidental happening of the moment, growing out of the attack or defense of the train conductor, and the resulting injury or crime, can not be equitably imputed to the fault of the empresarios, for the law does not extend the responsibility for such acts, of themselves personal, to those who are not culpable."

That case also involved certain additional statutes which had been passed to control the matter of operating steam railroads, which have no applicability in the present case wherein the defendant was engaged in operating a motor bus.

Your petitioner further states that the provisions of the
64 Code quoted above was similar to the provisions of Articles 1902 and 1903 of the Civil Code of Spain in force in the Philippine Islands which in the case of Johnson vs. David, 5 Philippine Reports 663, were held to exonerate the owner of a vehicle negligently operated by his servant, which decision was confirmed in the case of Manila vs. Gambe, 6 Philippine Reports, page 49. In Ware vs. Canal Company, 17 La. 169, speaking of a similar section of the Louisiana Code, the Court said: "But the same article which creates this liability restricts it to those cases where the masters or employers might have prevented the act which caused the damage, and have not done it."

10. And your petitioner further states that in deciding the pending case, the trial court did not file any opinion but followed, according to the oral statement of the Justice presiding at said trial, the decision in the case of Kong Ching Chong vs. Wing Chong, Vol. 2 Canal Zone Supreme Court Reports, page 25, wherein the Court applied the common law rules of equity to a case involving the doctrine of resulting trusts and said in part:

"What effect has the letter of the President of the United States of May 9, 1904, to the Secretary of War on this rule? (meaning the rule applicable to resulting trusts). The material words are as follows: 'The laws of the land, with which the inhabitants are familiar, and which were in force on February 6th (26th), 1904, will continue in force in the Canal Zone.' "

"The most cursory reading of these words should satisfy the most critical that the powers of the courts of the Canal Zone were not here defined but that a provision was made to protect vested rights, and to furnish rules of action for the inhabitants.

"The words mean no more and were intended to mean no more. A usual and customary provision in such cases.

65 "What is the Circuit Court of the Canal Zone? A court limited in its jurisdiction by the substantive law of Panama? Not so. They are courts of equal plenary jurisdiction with the Court of King's Bench in Great Britain and the Circuit Courts of the States of the Union of the United States. * * *

"In determining the vested rights of the people in the ceded territory of the Canal Zone, this inhibition is upon the courts; but in cases arising after the establishment of said courts relief on facts subsequently arising, is to be given in harmony and in accordance with the established law of the United States, where life, liberty, and property are involved."

Your petitioner states that its employee operating the motor bus, whose wrongful act in driving said bus at an unlawful and negligent rate of speed resulted in injury to the plaintiff, was a duly licensed chauffeur who had been employed as such by other persons for a number of years and who had been employed by your petitioner for about two months preceding said act; that said employee had been selected with due care and the defendant, your petitioner, was not in any wise chargeable with negligence or fault in the selection of its said employee and in no manner contributed to the injury to the plaintiff, and all of these facts were duly proved at the trial of said case, and the refusal of the trial court to recognize the defense of your petitioner, denied it a right claimed under the statutes of Congress above cited and denied its right under the executive order of the President of the United States; that from the judgment rendered in said action, your petitioner brought said case to the Circuit Court of Appeals for the Fifth Circuit under the provisions of Section 9 of the Act of Congress of August 24, 1912; that said court on the 5th day of February, 1917, affirmed said judgment applying the common law rules of master and servant, and not considering the particular laws above set forth.

66 In consideration whereof your petitioner prays that this Court may issue its writ of error to the United States Circuit Court of Appeals for the Fifth Circuit, directing that the record in said cause be transmitted to this Court for review.

PANAMA RAILROAD COMPANY,
INCORPORATED,

(Signed) By E. A. DRAKE, *Vice-President.*

(Signed) JACKSON H. RALSTON,
WM. E. RICHARDSON,
FRANK FEUILLE,
Attorneys for Petnr.

CITY AND COUNTY OF NEW YORK, *ss:*

E. A. Drake, being first duly sworn on oath deposes and says that he is the Vice President of the Panama Railroad Company, that

he has read the foregoing petition and subscribed the name of said Company thereto, that the facts therein alleged are true to the best of his knowledge, information and belief.

(Signed) E. A. DRAKE.

Subscribed and sworn to before me this 1st day of April, A. D. 1917.

(Signed) W. G. FITCH,
Commissioner of Deeds for New York County.

County Clerk's No. 11.
New York Register No. 19005.
Commission Expires Jan. 23, 1919.

Granted upon condition that plaintiff in error execute a bond for $5000.00 conditioned to satisfy any judgment which may be rendered against it.

(Signed) J. C. McREYNOLDS,
Associate Justice.

May 3rd, 1917.

67 *Bond on Writ of Error.*

Filed May 7th, 1917.

In the United States Circuit Court of Appeals, Fifth Circuit.

No. 3015.

PANAMA RAILROAD COMPANY, Plaintiff in Error,

versus

THEODORE BOSSE.

Know all men by these presents, That we, the Panama Railroad Company, a corporation, as principal, and the Fidelity and Deposit Company of Maryland, a corporation, as surety, are held and firmly bound unto Theodore Bosse, of Balboa Heights, Canal Zone, in the full and just sum of Five Thousand ($5,000.00) dollars, to be paid to the said Theodore Bosse, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, successors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this fifth day of May, in the year of our Lord one thousand nine hundred and seventeen.

Whereas, lately at a term of the United States Circuit Court of Appeals for the Fifth Circuit, in a suit pending in said Court, between the Panama Railroad Company, plaintiff in error, and said Theodore Bosse, defendant in error, said court affirmed a judgment of the District Court of the Canal Zone, which said judgment was rendered against the said Panama Railroad Company and in favor

of the said Theodore Bosse, and the said Panama Railroad Company has applied to the Supreme Court of the United States for a writ of error to review said judgment, having obtained the same, and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed
68 to the said Theodore Bosse, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, That if the said Panama Railroad Company shall prosecute its writ to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue. Sealed and delivered in presence of

PANAMA RAILROAD COMPANY,
A CORPORATION,

(Signed) By WILLIAM E. RICHARDSON,
Its Attorney.

[SEAL.] FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

(Signed) By H. B. HODGES, *Attorney-in-Fact.*

(Signed) HARVEY T. WINFIELD.
ALFRED B. BAKER.

Approved by:
(Signed) J. C. McREYNOLDS,
Associate Justice of the Supreme Court of the United States.

Clerk's Certificate.

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 55 to 68 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 3015, wherein The Panama Railroad Com-
69 pany is plaintiff in error, and Theodore Bosse is defendant in error, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 54 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City

of New Orleans, Louisiana, in the Fifth Circuit, this 26th day of May, A. D. 1917.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals.

70 *Assignments of Error.*

Filed May 31st, 1917.

United States Circuit Court of Appeals, Fifth Circuit.

No. 3015.

PANAMA RAILROAD COMPANY, Plaintiff in Error,

versus

THEODORE BOSSE, Defendant in Error.

Assignments of Error on Appeal to United States Supreme Court.

Comes now the plaintiff in error and assigns the following as error on which he will rely upon his prosecution of the Writ of Error now pending in the above entitled cause:

First. The Circuit Court of Appeals erred in affirming the judgment of the District Court of the Canal Zone in overruling the demurrer to the Amended Complaint in this that it thereby held that the liability of the plaintiff in error was to be determined in accordance with the common law rules with respect to the liability of corporations for the acts of their agents, instead of by the rules of the civil law then in force in the Canal Zone by reason of the adoption by the governing authority of said Zone of the pre-existing laws of the Republic of Panama.

Second. The said Court erred in affirming the judgment of the District Court of the Canal Zone in holding that the plain-
71 tiff in error was responsible in damages for the wrongful acts of the operator of its motor bus in causing the injury to the defendant in error.

Third. The said Court erred in affirming the judgment of the said District Court of the Canal Zone in instructing the jury that if the plaintiff in error be found responsible for the injury to the defendant in error, damages to be allowed should include damages for the mental and physical pain and suffering of the said defendant in error as a consequence of the injuries described in the Complaint.

(Signed) FRANK FEUILLE,
J. H. RALSTON,
WM. E. RICHARDSON,
Attorneys for Plaintiff in Error.

72 *Clerk's Certificate.*

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered 70 and 71 next preceding this certificate contain a full, true and complete copy of the Assignments of Error in a certain cause in said Court, numbered 3015, wherein The Panama Railroad Company is plaintiff in error, and Theodore Bosse is defendant in error, as full, true and complete as the original of the same now remaining in my office.

In testimony whereof I have *hereby* subscribed my name and affixed the seal of the said Circuit Court of Appeals at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 31st day of May, A. D., 1917.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals.

73 [Endorsed:] No. 3015. United States Circuit Court of Appeals for the Fifth Circuit.
Panama Railroad Company, Plaintiff in Error, vs. Theodore Bosse, Defendant in Error. Copy of Assignments of Error.

74 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals before you, or some of you, between Panama Railroad Company, plaintiff in error, vs. Theodore Bosse, defendant in error, No. 3015, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid

being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the fifth day of May, in the year of our Lord one thousand nine hundred and seventeen.

[Seal of the Supreme Court of the United States.]

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Allowed by
J. C. McREYNOLDS,
Associate Justice of the Supreme Court of the United States.

75 United States Circuit Court of Appeals for the Fifth Circuit.

Office of the Clerk.

I hereby certify that a true copy of the within Writ has this day been lodged in the clerk's office for the use of the Defendant in Error.

New Orleans, La., May 7th, 1917.

FRANK H. MORTIMER,
Clerk U. S. Circuit Court of Appeals, Fifth Circuit.

[Endorsed:] No. 3015. In the United States Circuit Court of Appeals, Fifth Circuit.

Panama Railroad Company, Plaintiff in Error, versus Theodore Bosse, Defendant in Error. Writ of Error.

Filed 7th day of May, 1917. Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals.

76 UNITED STATES OF AMERICA, *ss:*

To Theodore Bosse, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the United States Circuit Court of Appeals for the Fifth Circuit, wherein Panama Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable James C. McReynolds, Associate Justice of the Supreme Court of the United States, this fifth day of May, in the year of our Lord one thousand nine hundred and seventeen.

J. C. McREYNOLDS,
Associate Justice of the Supreme Court of the United States.

77 On this 15th day of May, in the year of our Lord one thousand nine hundred and seventeen, personally appeared John H. Poole before me, the subscriber, and makes oath that he delivered a true copy of the within citation to Theodore Bosse, the defendant in error, at Balboa Heights, Canal Zone, on May 14th, 1917.

JOHN H. POOLE,
Deputy U. S. Marshal, District of the Canal Zone.

Sworn to and subscribed the 15th day of May, A. D. 1917.

[Seal District Court, Canal Zone.]

E. M. GOOLSBY,
Clerk of the Court, Ancon, Canal Zone.

Marshal's Fees:

Service	$1.00
Mileage	.10
	$1.10

[Endorsed:] 3015. In the United States Circuit Court of Appeals, Fifth Circuit.

Panama Railroad Company, Plaintiff in Error, versus Theodore Bosse, Defendant in Error. Citation and Marshal's Return.

Filed 25 day of May, 1917. Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals.

Endorsed on cover: File No. 25,989. U. S. Circuit Court of Appeals, 5th Circuit. Term No. 522. Panama Railroad Company, plaintiff in error, vs. Theodore Bosse. Filed June 2nd, 1917. File No. 25,989.

SUBJECT INDEX

PANAMA RAILROAD COMPANY, *Plaintiff in Error,*

vs.

THEODORE BOSSE, *Defendant in Error.*

SUPREME COURT OF THE UNITED STATES, No. 203, OCTOBER TERM, 1918.

ARGUMENT UNDER ASSIGNMENT OF ERRORS NUMBER THREE—Continued.

APPENDIX INDEX.

REFERENCES TO LAWS, STATUTES, AND ORDERS REFERRED TO IN BRIEF.

Acts of Congress and Executive Orders, Etc.

Civil Code of the Canal Zone.

Civil Code of Panama.

Civil Code of Louisiana.

Civil Code of the Philippine Islands.

Civil Code of Porto Rico.

Civil Code of Spain.

Code of Civil Procedure of the Canal Zone.

Code of Civil Procedure of Cuba and Porto Rico.

Spanish and Colombian Laws and Commentaries.

CASES CITED AND REFERRED TO.

BRIEF AND ARGUMENT ON BEHALF OF
PANAMA RAILROAD COMPANY

SUPREME COURT OF THE UNITED STATES

No. 522

PANAMA RAILROAD COMPANY,
Plaintiff in Error

versus

THEODORE BOSSE,
Defendant in Error

SUPREME COURT OF THE UNITED STATES.

THE PANAMA RAILROAD COMPANY,
Plaintiff in Error,
vs.
THEODORE BOSSE.

No. 522.

In Error to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF OF PLAINTIFF IN ERROR.

Theodore Bosse, an employee of The Panama Canal, was injured by one of the busses operated by the plaintiff in error, while walking on the road leading from the Administration Building at Balboa Heights to Ancon, in the Canal Zone. He instituted suit in the District Court of the Canal Zone, Balboa Division, and recovered damages in the sum of $2,500 against the plaintiff in error, by verdict of a jury. The defendant in error suffered the loss of the second toe of the right foot, from which no permanent injury will result to cause him any diminution in his capacity to earn a livelihood. He suffered no pecuniary loss as a result of the injury, but the injury did cause him pain and suffering.

Before the trial on the merits, the plaintiff in error interposed a demurrer to defendant in error's complaint upon the ground:

First.—That it did not state facts sufficient to constitute a cause of action.

Second.—Because the allegations in the complaint, setting forth the plaintiff in error's physical pain and suffering as an element of damages was not authorized by the laws of the Canal Zone. (P. 4 of the record.)

The demurrer was overruled, and plaintiff in error's exception to the Court's ruling was noted. (P. 8 of the record.)

On the trial of the case before the jury, and after the evidence of the defendant in error was in, the plaintiff in error moved the Court to instruct the jury to return a verdict in its behalf, upon the grounds that the evidence showed no negligence on the part of the company; and that it failed to show that the chauffeur's negligence was the direct and proximate cause of defendant in error's injuries. Furthermore, because all of the testimony of defendant in error's witnesses indicated that the conduct and negligence of the negro on the bicycle were the direct and proximate cause of plaintiff in error's negligence; his negligence being the proximate cause of the accident insulated any negligence that the plaintiff in error's servant might have been guilty of. Plaintiff in error's motion was overruled by the Court, to which ruling an exception was then and there noted. (P. 20 of the record.)

Upon the conclusion of the testimony on behalf of both parties, counsel for the plaintiff in error moved the Court to direct the jury to return a verdict for the plaintiff in error, for the reason that upon the case, as presented by both parties, it appeared that plaintiff in error was not negligent, but that the defendant in error himself was negligent, and that he was on the side of the road other than the law required him to be on; furthermore, that the evidence clearly showed that the antics of the colored man upon the bicycle and his negligence was the proximate cause of defendant in error's injuries; that this intervening cause was the proximate

cause of the accident, and was, as a matter of law, such negligence as would insulate any negligence which the defendant company might have been guilty of. The Court overruled the motion, and the plaintiff in error then and there excepted to the Court's ruling. (Pp. 24 and 25 of the record.)

No financial or economic damages resulted to the defendant in error, and the verdict of the jury was based entirely upon the fact that the defendant in error had lost his toe and that he had suffered physical pain and suffering, and the instruction of the Court to the jury was substantially to that effect. (Pp. 29 and 30 of the record.)

The jury rendered a verdict assessing damages in favor of the defendant in error, as already stated, and at a subsequent date a motion for a new trial was filed by the plaintiff in error, which was overruled by the Court, to which ruling the plaintiff in error then and there excepted, and thereafter excepted to the judgment entered by the Court upon the verdict of the jury. (Pp. 10, 11, and 12 of the record.)

The plaintiff in error, having sued out a writ of error from the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, the case was heard by that court, and judgment was entered therein on February 5, 1917, affirming the final judgment of the trial court.

Thereafter, a writ of error from the Supreme Court of the United States against the judgment of the Circuit Court of Appeals of the Fifth Circuit was applied for and allowed on the third day of May, 1917.

The plaintiff in error seeks a reversal of the judgment of the Circuit Court of Appeals on the following assignments of error:

First.—The Circuit Court of Appeals erred in affirming the judgment of the District Court of the Canal

Zone in overruling the demurrer to the amended complaint in this that it thereby held that the liability of the plaintiff in error was to be determined in accordance with the common law rules with respect to the liability of corporations for the acts of their agents, instead of by the rules of the civil law then in force in the Canal Zone by reason of the adoption by the governing authority of said Zone of the pre-existing laws of the Republic of Panama.

Second.—The said Court erred in affirming the judgment of the District Court of the Canal Zone in holding that the plaintiff in error was responsible in damages for the wrongful acts of the operator of its motor bus in causing the injury to the defendant in error.

Third.—The said Court erred in affirming the judgment of the said District Court of the Canal Zone in instructing the jury that if the plaintiff in error be found responsible for the injury to the defendant in error, damages to be allowed should include damages for the mental and physical pain and suffering of the said defendant in error as a consequence of the injuries described in the complaint.

PRELIMINARY STATEMENT RESPECTING THE LEGAL PRINCIPLES APPLICABLE TO THE CASE.

Before discussing in detail the errors assigned we desire to submit some suggestions of a general character relative to the laws of the Canal Zone applicable to the case.

The Act of Congress approved June 28, 1902, entitled "An Act to provide for the construction of a Canal connecting the waters of the Atlantic and Pacific oceans," authorized the President to acquire the Canal strip, and to take control of it, and to purchase the property of the Panama Railroad Company.

The negotiations with Colombia having failed, the United States, after recognizing the independence of the Republic of Panama, acquired the Canal Zone by virtue of the Canal Treaty of November 18, 1903, and the rights and interests of the French Canal Company, including the latter's ownership in the Panama Railroad Company, were also acquired by the United States by virtue of said Act of June 28, 1902.

The Act of Congress approved April 28, 1904, entitled "An Act for the temporary government of the Canal Zone at Panama, the protection of the Canal works, and for other purposes," granted to the President of the United States, until the expiration of the 58th Congress all military, civil, and judicial powers, as well as the power to make all rules and regulations necessary for the government of the Canal Zone, and all rights, power, and authority, granted by the terms of the treaty to the United States, to be vested in such persons and to be exercised in such manner as the President directed for the government of the Canal Zone, and maintaining and protecting the inhabitants thereof in the full protection of their life, liberty, and religion.

The President of the United States, in conformity with the above-mentioned Act of June 28, 1902, appointed a Commission known as the Isthmian Canal Commission, which was to have charge of the construction of the Panama Canal, under the direction and control of the President.

Pursuant to the authority granted to him by the above-mentioned Act of Congress of April 28, 1904, the President addressed to the Secretary of War a letter dated May 9, 1904, by the terms of which the direction of Canal affairs was placed under the latter official, and authority was granted to the Commission to enact legislation for the Canal Zone. In assigning duties to

the various officials of The Panama Canal, the President, in the said letter, among other things, laid down the following rules:

> "The inhabitants of the Isthmian Canal Zone are entitled to security in their persons, property, and religion, and in all their private rights and relations. They should be so informed by public announcement. The people should be disturbed as little as possible in their customs and avocations that are in harmony with principles of well-ordered and decent living.
>
> "The municipal laws of the Canal Zone are to be administered by the ordinary tribunals substantially as they were before the change. Police magistrates and justices of the peace and other officers discharging duties usually devolving upon these officers of the law will be continued in office if they are suitable persons. The Governor of the Zone, subject to approval of the Commission, is authorized to appoint temporarily a judge for the Canal Zone, who shall have the authority equivalent to that usually exercised in Latin countries by a judge of a court of first instance, but the Isthmian Canal Commission shall fix his salary and may legislate respecting his powers and authority, increasing or diminishing them in their discretion, and also making provision for additional or appellate judges, should the public interest require.
>
> "The laws of the land, with which the inhabitants are familiar, and which were in force on February 26, 1904, will continue in force in the Canal Zone and in other places on the Isthmus over which the United States has jurisdiction until altered or annulled by the said Commission, but there are certain great principles of government which have been made the basis of our existence as a nation which we deem essential to the rule of law and the maintenance of order, and which shall have force in said Zone.

The principles referred to may be generally stated as follows:

"That no person shall be deprived of life, liberty, or property without due process of law; that private property shall not be taken for public use without just compensation; that in all criminal prosecutions the accused shall enjoy the right of a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense; that excessive bail shall not be required nor excessive fines imposed, nor cruel or unusual punishment inflicted; that no person shall be put twice in jeopardy for the same offense, or be compelled in any criminal case to be a witness against himself; that the right to be secure against unreasonable searches and seizures shall not be violated; that neither slavery nor involuntary servitude shall exist except as a punishment for crime; that no bill of attainder or *ex post facto* law shall be passed; that no law shall be passed abridging the freedom of speech or of the press, or of the rights of the people to peaceably assemble and petition the government for a redress of grievances; that no law shall be made respecting the establishment of religion or prohibiting the free exercise thereof." (Pp. 33 and 34 of First Annual Report of the Isthmian Canal Commission.)

In respect to the Panama Railroad Company, the letter in question contained the following instructions:

"By virtue of the ownership by the United States of about sixty-nine-seventieths of the shares of the capital stock of the Panama Railroad the general policy of the managers of said road will be controlled by the United States. As soon as practicable I desire that all the members of the Isthmian Canal Commission be elected to the board of directors of the road, and that

> the policy of the road be completely harmonized with the policy of the Government of making it an adjunct to the construction of the Canal, at the same time fulfilling the purpose for which it was constructed as a route of commercial movement across the Isthmus of Panama. If any contracts or other obligations now subsist between the railway company and other transportation companies that are not in accord with sound public policy, then such contracts must be terminated as soon as it is possible to effect that object.
>
> "No salary or per diem allowance of compensation in addition to the stated salary and per diem allowances of the members of the Isthmian Canal Commission will be allowed to any member of the Commission by reason of his services in connection with the civil government of the Canal Zone, or his membership of any board or commission concerned in or connected with the construction of the Canal or by reason of his services as an officer or director of the Panama Railroad." (P. 35 of Letter of Secretary of War transmitting First Annual Report of the Isthmian Canal Commission.)

There can be no doubt of the President's purpose to preserve the local institutions and customs of the people of the Isthmus of Panama. The purpose of the President appears again in a letter written by him on October 18, 1904, addressed to the Secretary of War, which reads as follows:

> "By Executive Order of May 9, 1904, I placed under your immediate supervision the work of the Isthmian Canal Commission, both in the construction of the Canal and in the exercise of such governmental powers as it seemed necessary for the United States to exercise under the treaty with the Republic of Panama in the Canal strip. There is ground for believing that in the execution of the rights conferred by the treaty the people

of Panama have been unduly alarmed at the effect of the establishment of a government in the Canal strip by the Commission. Apparently they fear lest the effect be to create out of part of their territory a competing and independent community which shall injuriously affect their business, reduce their revenues, and diminish their prestige as a nation. The United States is about to confer on the people of the State of Panama a very great benefit by the expenditure of millions of dollars in the construction of the Canal; but this fact must not blind us to the importance of so exercising the authority given us under the treaty with Panama as to avoid creating any suspicion, however unfounded, of our intentions as to the future. We have not the slightest intention of establishing an independent colony in the middle of the State of Panama, or of exercising any greater governmental functions than are necessary to enable us to conveniently and safely to construct, maintain, and operate the Canal under the rights given us by the treaty. Least of all do we desire to interfere with the business and prosperity of the people of Panama. However far a just construction of the treaty might enable us to go, did the exigencies of the case require it, in asserting the equivalent of sovereignty over the Canal strip, it is our full intention that the rights which we exercise shall be exercised with all proper care for the honor and interests of the people of Panama. The exercise of such powers as are given us by the treaty within the geographical boundaries of the Republic of Panama may easily, if a real sympathy for both the present and future welfare of the people of Panama is not shown, create distrust of the American Government. This would seriously interfere with the success of our great project in that country. It is of the utmost importance that those who are ultimately responsible for the policy pursued should have at first hand as

trustworthy information as can be obtained in respect to the conditions existing in Panama and the real interest of the people of that State. After a conference with the Secretary of State and yourself, I have concluded that it will be a great advantage if you can visit the Isthmus of Panama in person and hold a conference with the President and other governmental authorities of the Republic of Panama. You are authorized in doing this to take with you such persons as you desire, familiar with the conditions in the Isthmus, who may aid you with their counsel. The earlier you are able to make this visit the better. The Secretary of State will instruct the United States Minister at Panama to render you every assistance in his power, and the Governor of the Canal strip, General Davis, will, of course, do the same thing. You will advise the President of the Republic what the policy of this Government is to be, and assure him that it is not the purpose of the United States to take advantage of the rights conferred upon it by the treaty to interfere with the welfare and prosperity of the State of Panama or of the cities of Colon and Panama. You will make due report of the result of your visit on your return."

The President's instructions contained in the two letters above mentioned had the force and effect of laws, and were issued by him under the broad powers conferred by the Act of Congress of April 28, 1904, already mentioned.

Section 2 of the Act of Congress approved August 24, 1912, entitled "An Act to provide for the operation, maintenance, and protection of the Panama Canal and the government and sanitation of the Canal Zone, known as the Panama Canal Act," expressly ratifies as valid and binding all laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sani-

tation of the Canal Zone and the construction of the Panama Canal. The purpose of the congressional enactment was to remove all doubt as to the validity of the orders and resolutions theretofore issued by the President of the United States in respect to the Panama Canal and its adjuncts.

The two letters of the President to the Secretary of War, which we have referred to, contain some provisions that are quite pertinent to this case:

First.—The President directs that the laws of the land with which the inhabitants are familiar, and which were in force on February 26, 1904, shall continue in force in the Canal Zone and in other places on the Isthmus over which the United States have jurisdiction, until altered or annulled by the Commission.

Second.—The exercise of governmental powers given to the United States by the treaty within the geographical boundaries of the Republic of Panama were not to be exercised in a manner to arouse a distrust in the inhabitants of the Isthmus or to seriously interfere with the business or prosperity of the people of Panama, and that it should be made to appear to the Panamanians that it was our full intention that the rights which we are to exercise on the Isthmus would be with all proper care for the honor and interests of the people of Panama, and with no intention of establishing an independent colony in the middle of the State of Panama.

Third.—That the Panama Railroad was to be utilized to the fullest extent as an adjunct of the Canal, as well as an instrumentality of commerce.

With respect to the first of the three propositions just stated, we may say that the laws of the land with which the people of the Isthmus are familiar, insofar as they relate to the issues before this Court, have not been altered, amended, or repealed by competent authority,

and we are bringing the case before this Court because it is believed that the judgment sought to be reviewed does not conform to the laws of the Isthmus with which the people are familiar.

The instruction of the President to the Secretary of War, to the effect that the laws of the Isthmus should continue in force until altered or amended by competent authority, was simply declaratory of a well-recognized principle of international law, which has been observed by this Court in many cases.

> "In the future growth of the nation, as heretofore, it is possible that Congress may see fit to annex territories whose jurisprudence is that of the Civil Law. One of the considerations moving to such an annexation might be the very fact that the territory so annexed should enter the Union with its traditions, laws, and systems of administration unchanged. It would be a narrow construction of the Constitution to require them to abandon these, or to substitute for a system, which represented the growth of generations of inhabitants, a jurisprudence with which they had no previous acquaintance or sympathy.' (Holden *vs.* Hardy, Vol. 169, U. S. Reports, pp. 366 to 398.)

And in a case coming from the island of Porto Rico, this Court said:

> "Cases which have come to this court from the Philippines and Porto Rico, where we have had occasion to consider the enactments making changes in the laws of those islands, show the disposition of the Executive and Congress not to interfere more than is necessary with local institutions, and to engraft upon the old and different system of jurisprudence established by the Civil Law only such changes as were deemed necessary in the interest of the people,

> and in order to more effectually conserve and protect their rights." (Perez *vs.* Fernandez, 202 U. S., p. 91.)

The duty of our courts to enforce the Isthmian laws that have not been amended or annulled, in conformity with the principles of jurisprudence with which the inhabitants of the Isthmus are familiar, is not only required by the rules of international law, but there is a further obligation imposed upon them by the promise to the people of Panama, made by our President, that their laws and jurisprudence would be respected and observed by the courts until modified or repealed by competent legislative authority.

This Court will take judicial notice of the history of the Canal Zone and of its legal and political institutions. (210 U. S. p. 309.)

The principles of the English common law are unknown to the jurisprudence of Colombia and Panama. As was said by the Supreme Court of the Canal Zone under the old organization:

> "For one hundred years and more the territory of which the Canal Zone strip forms a part has been governed by the Napoleonic Code, and such a thing as common law entirely unknown." (Melendez *vs.* Union Oil Co., Vol. I, pp. 106 to 110, Reports of the Supreme Court of the Canal Zone.)

The instructions issued by the President that the laws of the land, with which the inhabitants are familiar and that were in force on the Isthmus on the 26th day of February, 1904, should continue in force until altered or amended, was observed by the courts as well as the other authorities in the Canal Zone until May 31, 1910, when the Supreme Court announced a decision which, in our judgment, was a departure from the rule established by the President. We respectfully refer the Court to the case of Kung Ching Chong *vs.* Wing

Chong, reported in the second volume of the Canal Zone Supreme Court Reports, page 25. The issue in that case would seem to be as to whether or not the courts of the Canal Zone had the power to declare a resulting trust in equity, when the facts of the case would have justified such a course in the chancery courts of the United States or England. In passing upon the issue, the Supreme Court of the Canal Zone discussed the President's letter of May 9, 1904, as follows:

> "What effect has the letter of the President of the United States of May 9, 1904, to the Secretary of War on this rule? (meaning the rule applicable to resulting trusts). The material words are as follows: 'The laws of the land with which the inhabitants are familiar, and which were in force on February 6th (26th), 1904, will continue in force in the Canal Zone.' "
>
> "The most cursory reading of these words should satisfy the most critical that the powers of the courts of the Canal Zone were not here defined, but that a provision was made to protect vested rights, and to furnish rules of action for the inhabitants.
>
> "The words mean no more and were intended to mean no more. A usual and customary provision in such cases.
>
> "What is the Circuit Court of the Canal Zone? A court limited in its jurisdiction by the substantive law of Panama? Not so. They are courts of equal plenary jurisdiction with the Court of King's Bench in Great Britain and the Circuit Courts of the States of the Union of the United States.
>
> "Courts of the highest jurisdiction in the world. Nothing jurisdictional is withheld from them. Over the life, the property, and liberty of the litigants before them they possess all jurisdictional power.

"The said letter also directs, 'That no person shall be deprived of life, liberty, or property without due process of law.' "

The Court then proceeds to quote a definition of due process of law from 4 Wheaton, page 235, and then continued as follows:

"Therefore, in this case, the practice, the construction, the remedies granted by the courts of the United States are a charge on and a jurisdictional part of the Circuit Courts of the Canal Zone.

"Transplanting courts of plenary jurisdiction to a land barren in liberal and generous construction can not operate to take from such courts their inherited jurisdiction as enjoyed in the land of their origin.

"In determining the vested rights of people in the ceded territory of the Canal Zone, this inhibition is upon the courts; but in cases arising after the establishment of said courts, relief on facts subsequently arising is to be given in harmony and in accordance with the established law of the United States, where life, liberty, and property are involved.

"Therefore, property here is governed by the inhibition that it shall not be taken away without due process according to the common law of the United States.

"As there are no authoritative decisions of the Supreme Courts of Colombia or Panama on the meaning of their statutes, the courts of the Canal Zone are in duty bound to follow the rules of statutory construction of the courts of common law and ascertain by them the meaning and spirit of the codes."

The decision of the Supreme Court of the Canal Zone just quoted, served as a basis for the subsequent decisions of that court, and since the reorganization of the Canal Zone judiciary under the Panama Canal Act of August 24, 1912, it has also served as a basis for the

decisions of the District Court of the Canal Zone, and was relied on by the trial court in the conduct of the trial of the case now before this court. As a result, the laws of the Canal Zone, of Colombian and Panamanian origin, are not being construed in a manner familiar to the inhabitants of the Isthmus, but rather in conformity with the principles of the English common law as modified by the jurisprudence of the various States of the Union. In one case the local court will follow the jurisprudence of some particular State of the United States, and soon thereafter apply principles of jurisprudence of another State to the same combination of facts, which results in two distinct rulings upon the same state of facts; and hence we drift without chart or compass, veered by every breeze.

The Circuit Courts, as well as the Supreme Court of the Canal Zone under the old organization, and for that matter the present courts of the Canal Zone, were created by statute. They had no common law jurisdiction. There is no law conferring upon the courts of the Canal Zone "equal plenary jurisdiction with the Court of Kings Bench in Great Britain and the Circuit Courts of the States of the Union and the United States." Neither is there any law to authorize the courts of the Canal Zone to ignore the substantive law of the land.

The doctrines of the common law of England do not prevail in the Canal Zone, nor the laws and usages of England nor of any State of the Union, except in a few instances where statutes of other States have been reenacted in the Canal Zone. As was said by the Supreme Court of the Canal Zone in the case of Melendez *vs.* Union Oil Company, and already referred to:

> "For one hundred years or more the territory of which the Canal Zone strip forms a part has been governed by the Napoleonic Code, and such a thing as common law entirely unknown."

The correct rules compel us to go to the source of the law for aid in its interpretation. The source here is the Colombian law and jurisprudence; that of Spain, and beyond the Spanish law to the Roman law. It is only when all those sources are exhausted that we are permitted to seek light elsewhere. This doctrine is recognized in the Civil Code of the Canal Zone. Article 27 of that code provides that:

> "When the meaning of the law is clear its literal tenor shall not be disregarded on the pretext of consulting its spirit.
>
> "But in order to interpret an obscure expression of the law it may be well to recur to its purpose and spirit clearly manifested in the law itself or in the true history of its establishment."

And Article 32 of the same code reads as follows:

> "In the cases in which the foregoing rules of interpretation are not applicable, the obscure and contradictory passages shall be interpreted in a manner that will best conform to the general spirit of the legislation and to natural equity."

We suggest that the two articles of the Civil Code just referred to militate against the doctrine announced by the Supreme Court of the Canal Zone, that in the absence of authoritative decisions of the Supreme Court of Colombia or Panama, on the meaning of the statutes, the courts of the Canal Zone are authorized to follow the rules of statutory construction of the common law, and ascertain from that source the meaning and the spirit of the code.

On January 31, 1913, the Supreme Court of the Canal Zone, in the case of Fitzpatrick *vs.* Panama Railroad Company, cited the decision of the Canal Zone Supreme Court in the case of Kung Ching Chong *vs.* Wing Chong, *supra*, with approval, to the effect that relief on facts arising after the establishment of the Canal Zone courts

is to be given in harmony and in accordance with the established laws of the United States where life, liberty, and property are involved, and the Court continued, as follows:

> "We think this is the rule that should be recognized and adopted by the courts of the Canal Zone unless our decision would bring us into direct, palpable, and unmistaken conflict with the laws which were in force in the Canal Zone on February 26, 1904. That is to say, if there is doubt or uncertainty as to the construction and interpretation of the laws here existing prior to February 26, 1904, the courts of the Canal Zone should accept and adopt that construction which more clearly harmonizes with the recognized principles of jurisprudence prevailing in the United States. Where the laws are clear and free from doubt and ambiguity it might be otherwise, and we might then be compelled to enforce the same pursuant to the provisions of the President's letter, herein referred to, notwithstanding they might conflict with our ideas of right and justice from the American viewpoint, but we should, so far as reasonably may be done, construe the laws so as to make them harmonize with the laws prevailing in the native land. In so doing we recognize the principle of International Law referred to by counsel for appellant and sustained in many well-considered decisions of the Supreme Court of the United States, that the laws, customs, and usages prevailing in ceded territories are to remain in force and effect until altered, modified, or repealed by the new sovereignty. But we also recognize the fact that the Canal Zone is largely peopled by Americans, and that American ideas, methods, modes of living, and conduct of business, predominate in the Canal Zone, and that, so far as may be reasonably done, the laws here should be given a construction in keeping with those in the States." (Vol. 2, page 111, Canal Zone Supreme Court Reports.)

It is apparent that the Supreme Court of the Canal Zone failed to give due consideration to the President's letter in making the announcement just quoted from the Fitzpatrick case. The laws of the land with which the inhabitants are familiar, and which were in force on February 26, 1904, must be construed in the light of Colombian and Spanish history, otherwise they would not be laws with which the inhabitants of the country are familiar. The fact that the Canal Zone may be largely peopled by Americans, with American modes of living and conduct of business, can not justify the court in disregarding the President's letter, which the Canal Zone court itself, in the Fitzpatrick decision, recognized as the organic law of the Canal Zone.

The Canal Zone at the present time is only populated with the employees of The Panama Canal and the Panama Railroad, and those of the steamship lines and oil companies who are permitted to do business in the Canal Zone under license. The Canal Zone, in fact, is nothing more than a right of way for the operation of the Panama Canal and its adjuncts. The people in the Canal Zone, however, have considerable business connection with Panama.

The instructions contained in the two letters from the the President to the Secretary of War, already referred to, would seem to indicate that it was the policy of our Government not to introduce a system of jurisprudence into the Canal Zone out of harmony with that of Colombia, Panama, and the other Latin-American republics to the north and south of the Canal. We are aware that this Court will follow the courts of last resort of the various States and Territories of the Union in the interpretation of local statutes, but here we have something more than the interpretation of local statutes. The issue involves a question of governmental policy. The Executive and Legislative Departments of our

Government have declared that the laws of the land with which the people on the Isthmus are familiar shall continue in force; and yet if our contention is correct the local courts are disregarding that mandate. We might add that the Canal Zone is neither a State nor a Territory, but is a possession under Executive control, and that the President exercises his authority therein through the Secretary of War and the Governor of the Canal Zone.

We will now discuss our assignments of error in detail in the light of Colombian and Panamanian law and jurisprudence, without regard to the jurisprudence of the United States, which, in our judgment, is not applicable to this case.

Our assignments of error will be found on page 48 of the record.

ASSIGNMENT OF ERROR NO. 1.

The Circuit Court of Appeals erred in affirming the judgment of the District Court of the Canal Zone in overruling the demurrer to the Amended Complaint in this that it thereby held that the liability of the plaintiff in error was to be determined in accordance with the common law rules with respect to the liability of corporations for the acts of their agents, instead of by the rules of the civil law then in force in the Canal Zone by reason of the adoption by the governing authority of said Zone of the pre-existing laws of the Republic of Panama.

This assignment of error is based:

First.—Upon the ruling of the court in overruling the plaintiff in error's general demurrer to the defendant in error's complaint. The demurrer will be found on page 4 of the record, and the court's order overruling same will be found on page 8 of the record;

Second.—Upon the plaintiff in error's answer, wherein it denied each and all of the allegations of the defendant in error's complaint, and especially denied that the injuries complained of by the defendant in error were due to the fault or negligence of the defendant. (Pp. 9 and 10 of the record.)

Third.—On the ruling of the court in denying the plaintiff in error's motion for a directed verdict after the defendant in error's evidence had gone to the jury, which motion was based on the ground that the defendant in error had shown no negligence on the part of the plaintiff in error, and had failed to show that the direct and proximate cause of his injuries was the result of any negligence on the part of the plaintiff in error. (P. 20 of the record.)

Fourth.—Upon the ruling of the Court in denying the plaintiff in error's motion for a directed verdict after all of the evidence for both parties had been submitted to the jury, which motion was based upon the ground that the plaintiff in error was not negligent. (P. 24 of the record.)

Exceptions were reserved and noted in the record by the plaintiff in error to each and all of the said rulings of the trial court.

The following articles of the Civil Code of the Canal Zone would seem to be controlling of the issues presented by this assignment of error:

> "Art. 2341. He who has committed an offense or fault resulting in injury to another is obliged to indemnify him, without prejudice to the principal penalty that the law may impose for the fault or offense committed.
>
> "Art. 2347. Every person is responsible, not only for his own actions, for the purpose of indemnifying the injury, but for the acts of those that are under his charge as well.

"So the father, and in default of the father, the mother is responsible for the acts of the minor children who inhabit the same house. So the tutor or curator is responsible for the conduct of the pupil who lives under his dependency and care.

"So the conductors of colleges and schools respond for the acts of pupils while these are under their care, and the artisans and empresarios (persons in charge of an enterprise), of the acts of apprentices and dependents (dependientes) in the same case.

"But the responsibility of such persons shall cease if, with the authority and care conferred upon and prescribed for them in their respective capacities they could not have prevented the act.

"Art. 2349. The masters respond to the damage caused by their domestics and servants, done in the performance of service from the latter to the former; but they shall not be responsible if it shall be proven or if it appears that on such occasion the domestics or servants have comported themselves in an improper manner, that the masters had no means to foresee or impede the act by the use of ordinary care or competent authority; in this case all of the responsibility for the injury shall fall upon the said domestics and servants."

"Art. 2356. As a general rule, every injury imputed to malice or negligence of another person, shall be repaired by the latter."

We would add, however, that the defendant in error relied on the Executive Order issued by the President on February 28, 1912, by which the driving of automobiles through the streets of any city, town, or village of the Canal Zone at a speed exceeding eight miles an hour is prohibited, and a penalty of a fine and imprisonment is prescribed for a violation of its provisions.

The defendant in error's complaint against the plaintiff in error was based upon the theory that the chauffeur

in charge of the bus was operating the same at an excessive and unlawful rate of speed, in violation of the Executive Order above mentioned. Hence, the act of the chauffeur was penal in its nature, and he was liable to criminal prosecution, if the facts alleged in the complaint are true.

In the application of the provisions of the Civil Code, above quoted, the courts of Colombia and Panama have announced the doctrine that corporations are not liable for the penal acts of their agents and servants—that in such cases the guilt is personal to the offending agent or servant, and can not be extended to an artificial person such as a corporation, which is incapable of an intentional wrong violative of the penal laws.

Felipe Ramirez instituted a suit in the courts of Panama against the Panama Railroad Company, and obtained a judgment against the company in the trial court on the 28th day of July, 1885. Both parties appealed from the judgment of the trial court to the Superior Court of Panama, where a decision was rendered on January 8, 1886, reversing the judgment of the trial court.

An attempt was made to obtain a review of the judgment of the Superior Court of Panama by the Supreme Court of Colombia at Bogota. The Supreme Court declined to take jurisdiction of the case, without going into its merits. A full translated copy of the decision of the Superior Court of Panama, as well as a copy of the decision of the Supreme Court of Bogota will be found on pages 91 to 111 of the appendix to this brief.

The facts in the case of Ramirez *vs.* The Panama Railroad Company were as follows:

The plaintiff, Felipe Ramirez, was an employee of the French Canal Company, and seems to have had some duties in connection with the company's mail. He boarded one of the trains of the Panama Railroad

Company and was ordered to get off by the conductor. He insisted that he had a right to ride, because he was an employee of the Canal Company, and was thus entitled to transportation under agreements between the two companies. He failed to satisfy the conductor upon this point, and the latter ejected him from the train, causing him serious bodily injury to the extent of the loss of one of his legs. He claimed 60,000 pesos as damages from the company, by reason of the unlawful act of the conductor. A judgment was rendered by the trial court against the railroad company, but the amount of the damages was not fixed in the judgment, and in consequence, both parties appealed to the Superior Court. The Superior Court decided that the conductor was liable for the injury to the plaintiff, and not the railroad company, because the act of the conductor was criminal. The Court also held that the Panama Railroad Company was not liable under the Code of Commerce, because the plaintiff had failed to prove a contractual relation between him and the company, inasmuch as he had exhibited no ticket authorizing his transportation nor any contract between the two companies which would authorize him to ride upon the railroad company's trains.

The principle that a corporation can not be guilty of a penal offense, and, therefore, not liable in damages for acts or omissions, penal in their nature, of its employees, was announced in the case of Ruperto Restrepo *vs.* The Sabana Railway Company (La Compañia del Ferrocarril de Sabana), in a decision rendered by the Supreme Court of Colombia at Bogota on July 19, 1892, which decision was published in the *Gaceta Judicial* of Bogota, Vol. 8, No. 353, pages 332 to 334. A full translation of this case will be found on pages 112 to 123 of the appendix to this brief.

In the Restrepo case the railway company was sued for damages on account of the unlawful taking of land belonging to the plaintiff, by the administrator of the company for use as a right-of-way; and also on account of the killing of plaintiff's cattle by the defendant company's train upon its right-of-way.

The attempt to recover from the railroad company for the trespass upon the land was denied, upon the ground that such a trespass was a criminal act, and that the company could not be held responsible for it, inasmuch as an artificial entity, such as a corporation, could not be held guilty of an intentional wrong; that the responsibility for the invasion of the plaintiff's land was upon the manager of the company. In discussing this phase of the case the Supreme Court of Colombia used the following language:

> "As a matter of fact the charge referred to being based on the fact that the railroad company occupied the said zone without the consent of the owner, this act, as the Tribunal points out, would have constituted an offense according to the provisions of Articles 693 and 694 of the Penal Code in effect at the time the occupation took place; but as the responsibility for this *delito* attaches to a juridical entity (*entidad juridica*) which can not be considered criminally responsible, because we can not suppose in such entities a voluntary and malicious violation of the law by which any penalty may be incurred, a violation and malice which could not exist in an artificial person (*ser ficticio*), it is clear that if such responsibility exists it can only be exacted of the representative of such entity; so that in exacting the responsibility, as has been done, of the entity itself, the fundamental principle of criminal law which demands that the delinquent and the person condemned be identical, has been violated."

Damages were allowed to Restrepo for the killing of his cattle by the company's train, upon the ground that the railroad was negligent in not fencing its right-of-way against cattle, although it had received previous information that the company's trains had been killing cattle on the right-of-way.

There would seem to be no difference in principle in the case now before the Court and the Restrepo case. If in the latter case the company was not liable for the unlawful act of the manager in taking Restrepo's land it would seem to follow that the plaintiff in error is not responsible for the act of the chauffeur in violating the speed laws of the Canal Zone. We invite the Court's attention to the full text of the decision in the Restrepo case.

To a better understanding of the meaning and purpose of the local laws of the Canal Zone cited in this brief, we will refer briefly to the history of the legislation and jurisprudence of Colombia and Panama, insofar as they relate to the points at issue herein.

The Civil Code now in effect in the courts of the Canal Zone was enacted by the Congress of Colombia in 1873, but was not made applicable to the States and Departments of the Republic until 1887. Before that time the application of the civil code was limited to the State of Cundinamarca, in which Bogota, the capital of the Republic of Colombia, is situated. After 1887, the Civil Code was in force in every part of the Republic. Prior to 1873, the law relative to obligations, whether arising *ex contractu* or *ex delicto*, was to be found in the laws of Spain known as the *Siete Partidas*. The State of Panama had a civil code of its own from 1860 until 1887, which was superseded by the National Civil Code, but the provisions of the Civil Code of the State of Panama respecting obligations were identical with those of the National Civil Code of 1873.

If we look to the *Siete Partidas* for light upon this subject we find that accountability for the commission of a tort belonged to the person who committed it. Law III, Title XXV, Partida VII, provides:

> "He who causes the damages shall make repairs to the one receiving the damage, and this can be required of anyone who had done the damage with his own hands or caused it by his fault, command, or counsel."

The *Siete Partidas* furnished the law for Colombia until the Civil Code of 1873 was enacted by the Congress of the Republic, and the Partidas were also the law for the State of Panama until 1860, when the Panamanian Civil Code was adopted. Articles 2341, 2347, 2349, and 2356 of the National Code are identical with Articles 2442, 2448, 2450, and 2457 of the former Civil Code of the State of Panama, and the provisions of those two codes did not modify the rule of the *Siete Partidas*. The doctrine that guilt is personal remained unimpaired under the laws of Colombia and Panama.

Articles 2341 and 2356 of the Civil Code of the Canal Zone do not authorize a recovery of damages against anyone except the person who is guilty of an act or omission resulting in the injury. The doctrine of respondeat superior does not arise from either one of these two articles. This clearly appears from the fact that it was deemed necessary to enact Articles 2347 and 2349 in order to extend liability to those from whom the offending persons depend.

It will be noted that the responsibility of the superior for the acts of the servant or dependent under these two articles is limited to cases in which the superior has failed to exercise due authority and care with reference to those dependent of them, and if it appears that the servants have comported themselves in an improper manner, and that the masters had no means to foresee

or impede the act by means of ordinary care and competent authority, then the masters or principles are not responsible, but in such cases all of the responsibility for the injury falls upon the servant or dependent.

If the master has been careful in the selection of his servants or dependents, and the latter have acted in a manner which the master or principal could not have foreseen or prevented, then the responsibility is upon the servant or dependent.

If we refer to the jurisprudence of other jurisdictions, the substantive law of which is of Spanish source, we find that the same limitations upon the rule of respondeat superior are recognized.

The provisions of the Civil Code of Spain in force in the Philippines, relative to actions for damages for personal injuries were interpreted by the Supreme Court of the island in the case of Johnson *vs.* David, reported in Volume V, pages 663 to 667, of the Philippine Reports. The facts of the case were as follows: The plaintiff instituted an action in the justice court against the defendant on account of damages sustained by him resulting from a collision between the coach of the defendant, driven by his cochero, and the bicycle of the plaintiff, upon which the latter was riding. The owner of the coach was not in it at the time. The plaintiff alleged that the horse was being driven faster than was reasonable or allowable; that he, the plaintiff, rang the bell of his bicycle to attract the attention of the defendant's cochero; that the plaintiff was unable to stop by reason of the fact that other carriages were coming behind him on the incline of the approach to the bridge; that the plaintiff was riding on his bicycle on the left path of the bridge, as required by the ordinance; that the defendant's cochero made a detour with the horse and carriage and attempted to approach the bridge upon the left side in a diagonal direction; that reason-

able care was not taken by defentant's cochero in driving or approaching the bridge, by reason of which lack of care he collided with the plaintiff and threw the latter to the ground, then followed other allegations of negligence and carelessess on the part of the defendant's cochero. A judgment was rendered in favor of the plaintiff, and an appeal was taken to the Court of the First Instance of the City of Manila by the defendant, where a judgment was again rendered in favor of the plaintiff. An appeal was then taken to the Supreme Court of the Philippines, upon the ground that the judgment was contrary to law. The case was reversed by the Supreme Court, and in making this ruling the Court, among other things, said:

> "The question presented by these facts is, is the owner of a carriage driven by his cochero, liable for injuries growing out of the negligence of said cochero, in the absence of such owner?
>
> "No evidence was adduced during the trial of said cause to show that the defendant had been negligent in the employment of the cochero or that he had any knowledge that such cochero was incompetent or of the general negligent character of said cochero, if such existed. Can the negligent acts of a cochero in driving the carriage of his master be attributed to the owner of the horse and carriage, in the absence of such owner and master?"

The Court then refers to the articles of the Civil Code of Spain, which are substantially the same as those of the Canal Zone and Colombia. They read as follows:

> "Art. 1902. A person who by an act or omission causes damages to another when there is fault or negligence shall be obliged to repair the damage so done."
>
> "Art. 1903. The obligation imposed by the preceding article (1902), is demandable, not only for personal acts and omissions, but also for

those of the persons for whom they should be responsible."

And the Court said further:

> "It would seem, from an examination of these various provisions, that the obligation to respond for the negligent acts of another was limited to the particular cases mentioned; in other words, we are of the opinion and so hold that it was the intention of the legislature in enacting said Chapter 2 to enumerate all of the persons for whose negligent acts third persons are responsible. Article 1902 provides when a person himself is liable for negligence. Articles 1903, 1904, 1905, 1906, 1907, 1908, and 1910 provide when a person shall be liable for injuries caused, not by his own negligence but by the negligence of other persons or things."

Articles 1905, 1906, 1907, 1908, and 1910 of the Code of the Philippines have no application to the case before this Court.

The Supreme Court of the Philippines ended its decision by saying:

> "The defendant not having contributed in any way to the injury complained of, he is in nowise responsible for the same. The judgment of the lower court is, therefore, hereby reversed."

The Civil Code of Louisiana contains provisions which are somewhat broader than those of the Civil Code of the Canal Zone in respect to the responsibility of the master for the acts of his servants. The pertinent part of Article 2315 (2294) of the Civil Code of Louisiana reads as follows:

> "Every act whatever of a man that causes damage to another, obligates him by whose fault it happened to repair it."

And Article 2316 (2295) of the same code provides that every person is responsible for the damage he

occasions, not merely by his act, but by his negligence, his imprudence, or his want of skill.

Article 2317 (2296) of the same code reads as follows:

> "We are responsible not only for the damage occasioned by our own acts, but for that which is caused by the acts of persons for whom we are answerable, or of things which we have in our custody. This, however, is to be understood with the following modifications:

Article 2320 (2299) reads as follows:

> "Masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed.
>
> "Teachers and artisans are answerable for the damage caused by their scholars or apprentices, while under their superintendence.
>
> "In the above cases responsibility only attaches when the master or employers, teachers, and artisans might have prevented the act which caused the damage and had not done it."

It will be noted that the Louisiana Code holds the master or employer responsible for the acts of his servants and overseer, for anything done in the course of their employment, and consequently, the language has a broader scope than is the case with the Colombian and Panamanian law.

Now let us see how the Supreme Court of Louisiana has interpreted those provisions:

In the year 1840, the case of Ware *vs.* The Barataria and La Fourche Canal Company came before the Supreme Court of Louisiana. The decision in the case will be found reported in Volume 15, pages 169 to 173, Louisiana Reports (Book 12). It appears that the plaintiff was returning with his skiff or boat with oysters on the Barataria Canal, and in passing through

the locks near the Mississippi River he was violently seized and assaulted by the keeper of the locks under the employ of the defendant company. The violence was offered to the plaintiff under the pretext that he had not paid the toll, although the same had not been demanded of him. Such was the plaintiff's allegation. The plaintiff obtained a judgment in the trial court for damages. The defendant appealed. The Supreme Court, in passing upon the case, said that the responsibility for the acts and neglect of agents of corporations, as well as natural persons, existed on the same ground and in the same manner and to the same extent. The question to be determined is, how is that liability regulated by Louisiana law? The Court then said:

> "In the chapter of the Louisiana Code treating of offenses and quasi-offenses, we find that masters and employers are responsible for the damage occasioned by their servants and overseers in the functions in which they are employed; but the same article which creates this liability restricts it to those cases where the masters or employers might have prevented the act which caused the damage, and have not done it.'

In support of the doctrine, the Court cites the cases of Palfrey *vs.* Kerr, 8 Martin N. S., page 503; Strawbridge *vs.* Turner and Woodruff, 8 Louisiana Reports, page 538. The Court further said:

> "The plaintiff's counsel has called our attention to the case of Robassa *vs.* Orleans Navigation Company, 5 Louisiana Reports, page 461 (25 Am. Dec. 200), decisive against the defendant; but in that case the evidence showed and the ground of the decision was, that the company had authorized the trespass, which was the subject of the complaint. It is said that in most cases, the restriction in the code will do away entirely with everything like responsibility in the master or employer, for it will seldom happen

that the latter can prevent the act which causes the damage. This may be and we believe is true, but our duty is to apply the law when its letter is clear, and we could not justify a violation of its precepts on the ground of any supposed or real inconvenience and difficulty attending its application. The law, if defective, can be modified by that branch of the Government whose province it is to make our laws, or amend them when experience shows their inadequacy to subserve the purposes of justice. This restriction to the liability of masters and principals was an unfortunate and unadvised departure from the Napoleonic Code, from which most of the enactments of our laws on this subject have been taken almost verbatim. In that work, the restriction which exists in favor of fathers, teachers, etc., does not extend to masters or principals. The reason given for this distinction is, that servants and agents, when in the discharge of their duties, are supposed to be acting under the authority of their masters and principals; and that the latter should be attentive to employ none but good servants and agents, while the restricted liability of fathers, teachers, etc., has only for its object to secure from them a proper degree of watchfulness over the conduct of the persons entrusted to their care."

The wise counsel announced in the Ware case that imperfections in the law should be left to the legislative branch of the Government for correction, has not been followed by the Canal Zone Courts.

The evidence in the record now before this Court shows that the chauffeur, Kirkbride, was an experienced chauffeur, acquainted with the rules of the road; that he was 21 years of age, and had always been considered an A–1 chauffeur; that he had been a chauffeur ever since he was 15 years old; that he had experience as a driver covering everything from Fords to 5-ton trucks;

and that he has passed his chauffeur's examination and was granted a license by the Canal Zone authorities. (Pp. 23 and 24 of the record.)

Section 2 of the Isthmian Canal Commission ordinance, entitled "Ordinance providing for the licensing of chauffeurs for automobiles," enacted by the Isthmian Canal Commission at its 160th meeting on April 15, 1911, and approved by the Secretary of War on April 26, 1911, provides that:

> "Every person desiring to operate any automobile over the streets and roads of the Canal Zone shall first make written application to the Board of Local Inspectors of the Canal Zone, stating his nationality, age, and character of experience in the operation of automobiles and gasoline and electric machinery; and shall have his application endorsed by two reputable citizens of the Canal Zone or of the cities of Colon or Panama, Republic of Panama, vouching for his sobriety and trustworthiness. The Board of Local Inspectors shall thereupon examine the applicant touching his knowledge of gasoline and electrical motors and machinery, and of the mechanism and operation of automobiles, as well as upon his knowledge of the English or Spanish language, and upon the laws and regulations of the Canal Zone relating to the operation of automobiles over the streets and roads of the Canal Zone. In order to determine the skill of any applicant, said board may require him to make a practical demonstration thereof."

And Section 3 of the said ordinance provides that:

> "No person shall be granted a chauffeur's license unless he is not less than 18 years of age, is of sober habits, is able to read either the English or Spanish language, and shall prove to the satisfaction of the Board of Local Inspectors that he has the knowledge, skill, and judgment necessary for the safe and skilful driving and handling of automobiles.

Section 5 of the said ordinance provides that upon the completion of an examination the Board of Local Inspectors shall make a report to the head of the Department of Civil Administration showing whether the applicant is competent under the provisions of this ordinance to operate automobiles over the Canal Zone streets and roads, and if the Board's recommendation is to the effect that the applicant is competent, the head of the Department of Civil Administration will thereupon issue to the applicant a license in the form prescribed in the ordinance.

The ordinance authorizes the head of the Department of Civil Adminstration to revoke any license issued thereunder, when it shall appear that the holder thereof, because of drunkenness or lack of skill in operating automobiles, should not be further entrusted with the operation of automobiles over the Canal Zone streets and roads; and Section 9 of the said ordinance defines an automobile as any vehicle of automobile or similar construction and operation. A penalty of a fine of not less than $25 and imprisonment in jail for a period of not to exceed thirty days is prescribed by Section 10 of the ordinance against any person who operates an automobile over the streets and roads of the Canal Zone without first having obtained a license, as provided for in the ordinance, and without complying with any other requirement of the ordinance applicable to such person.

It will thus be seen that Kirkbride, the chauffeur in question, had complied with the provisions of the Canal Zone ordinance, and had submitted himself to the rigid examination required by the terms of the ordinance.

The fact is thus established that the Panama Railroad Company had selected a competent, experienced and duly qualified chauffeur to operate the bus in question, and hence the company did all that was required

of it by provisions of Articles 2347 and 2349 of the Civil Code, and therefore, can not be held responsible for the act of the chauffeur.

Since the Bosse case was tried in the District Court of the Canal Zone, the Assembly of Panama has re-enacted the Civil Code of Panama, but with a number of modifications. The Judicial and Penal Codes of Panama have also been re-enacted with some modifications. These new codes became effective on the 30th of September, 1917. The provisions of the old Judicial Code that require criminal prosecution and conviction before a civil recovery could be had, have been done away with by the terms of the new Judicial Code.

Article 1644 of the new Civil Code of Panama takes the place of Article 2341 of the old code. The new article provides that:

> "He who by action or omission causes damage to another on account of fault or negligence, is obliged to repair the damage done."

Article 1645 of the new code takes the place of Articles 2347 and 2349 of the old civil code of Panama. Article 1645 of the new code provides that:

The obligation imposed by Article 1642 may be demanded not only for the acts or omissions of the offending party, but also of those for whom the persons included in Article 1644 are responsible; and the owners and directors of establishments and enterprises are equally responsible for the damages caused by their employees (dependientes) done in the branches of service in which they are employed, and in the performance of their duties. The article also provides that the responsibility therein treated of shall cease when the owners or directors prove that they have employed all the diligence of a good father of family to prevent the damage.

Article 1645 of the new Civil Code of Panama has broadened the responsibility of the superior, especially in respect to the liability of corporations for the acts of their servants and employees. The Supreme Court of Panama has had occasion recently to pass on the meaning of the two articles of the new Civil Code above referred to in a decision rendered on the 5th day of October, 1918, in the case of Amelia Orozco against the Panama Electric Light Company, in which she sought to recover damages for the death of her son, who was run over by one of the electric cars of the defendant company.

It was contended on behalf of the company that their motorman had been employed by the company for some years, and had never met with an accident, and that he was competent and experienced. The Supreme Court of Panama held that it devolved upon the company to establish the fact that the motorman was experienced in that business, and was a careful and competent man prior to his employment; and that that fact should have been established by disinterested witnesses other than employees of the company, who only testified to the motorman's conduct since his employment. *The courts of Panama are not inclined to give much credit to the testimony of interested witnesses, and in that respect the rules of evidence of the Republic differ materially from those prevailing in the Canal Zone and in the United States.*

But the Supreme Court of Panama distinguishes between cases in which the employer is bound to select employees who, in order to follow their trade, must obtain a license from governmental authority, and those in which the employer is free to select an employee of his choice. In the latter case, he must be sure that the employee selected is in every way qualified and that he is prudent and competent, while in the former case

the employer has a right to assume that one who obtains a license from a governmental agency is duly qualified to follow the profession or calling designated in the license. In discussing this issue, the Supreme Court of Panama said:

> "Now that this very important question has been touched upon it is proper to make a comparative study of the matter based on the Civil Code of Colombia, and on the one now in force which was taken in part from the Civil Code of Spain.
>
> "Article 2349 of the Colombian Civil Code provides that masters shall be responsible for the damage caused by their domestics or servants, on the occasion of a service rendered by the latter to the former; but they shall not be responsible if it be proved or appear that on such occasion the domestics or servants conducted themselves in an improper manner, which the masters had no means to foresee or prevent by the employment of ordinary care and competent authority; in such case all responsibility for the damage shall fall upon said domestics or servants.
>
> "The civil sanction which the quoted article establishes against the masters or patrons is based on the concept that they have the free election of their domestics or servants, and if they employ one who is careless or negligent, of bad habits, or disqualified for the work given him, they must bear the responsibility of the damages occasioned by his bad qualities or incapacity. Therefore, if it should be proven that the master did not have the absolute free election of his servant, but simply a relative one, as occurs in those callings which have been placed under regulations by the competent authorities, then the civil responsibility of the master ceases, because in exercising his choice of a servant he reposes confidence in the administrative authority, who authorizes the individual to follow the calling in question. That occurs in respect to

the conductors of automobiles commonly called "chauffeurs." The Government of Panama and that of the Canal Zone have established regulations for the exercise of the calling of chauffeurs, in such a manner that no one who has not been previously authorized may lawfully perform such duties. And so the owner of an automobile who is in need of a chauffeur requires of the latter, before everything else, that he produce a certificate of his qualification, or *license*, as it is commonly called. When the interested party produces those documents, corresponding to the Canal Zone and the City of Panama, the owner of the car then rests in the security that the person who has been authorized, by the competent authorities, to operate automobiles is a person qualified to do so, and that without any fear he may trust his life, that of his family, and that of the pedestrians to the hands of this expert, who has merited from the examining boards of the Canal Zone and the District of Panama these testimonials to his ability and to the fact that he is entitled to the confidence that may be reposed in him. We should bear in mind that in addition to the technique and practical knowledge that is required by the said boards, before a license is issued, the applicant is also required to present certificates from two persons who know him to the effect that he has observed good conduct, and that he has no degrading vices.

"In the same manner that society reposes confidence in the physician and the pharmacist, authorized by competent authorities to exercise their professions, that they are persons qualified and that the lives of dear ones may be trusted to them, so that same society has full confidence that the authorities will not issue certificates of competency to disqualified individuals to operate automobiles; and, in consequence, those who possess the certificates may guarantee, without any room for doubt, the proper exercise of so

delicate and dangerous a calling. When this calling is once placed under regulations it is the authorities that issue the certificate of qualification that should respond for any deficiency in the chauffeur, and, therefore, that same authority is disqualified to demand of the proprietor of the car that he pay damages occasioned by a person which that authority has authorized to operate automobiles.

"If the calling were not regulated, and the owner of the automobile could choose freely a servant to operate it, then the civil responsibility for damages caused by the incapacity of the servant would fall upon the owner, because in that case the owner would take the place of the board of examiners of chauffeurs, and he would have to investigate fully the competency of the applicant before admitting him into his service.

"But taking conditions as we find them the most that the master must do, and this he does to protect his own interest, is to ascertain the previous conduct of the individual; whether he has served in other places and what has been his deportment; whether he is addicted to drink or not; whether he is honorable, of a calm or violent temperament, and whether he has not had accidents of a serious nature. When the master has done all these things it can be said that he has complied with his duty, and that he has employed all the prudence necessary in order to avoid any accident that might result in damage to a third party; in other words, that he has employed the care of a good father of family, which is what is required by Article 2349 of the Civil Code when it speaks of the ordinary care and competent authority.

"There is another case in which a master, probably, would be responsible for the damage done by his chauffeur, and that is, if the car travels at a greater rate of speed than that permitted by the police rules without the master requiring the chauffeur to moderate the speed;

but if to the contrary the automobile was going at a rate of speed less than that permitted, when the accident occurred, it is clear that the owner is abolutely without responsibility, because he could not foresee or impede the accident by employing ordinary care and competent authority, and he could not anticipate that the servant would behave under such circumstances in an improper manner, due to the want of the necessary calmness or to the inexperience which the Board of Examiners and the competent authorities had attributed to him, and in respect to which the master relied upon him."

In speaking of a car traveling at an excessive speed, the Supreme Court of Panama, of course, had reference to a case where the car was occupied by the owner at the time of the accident. Continuing on the same issue, the Supreme Court of Panama said:

"The principle announced in Article 2349 is the same as that established in Article 2347, when it says that every person is responsible not only for his own actions, for the purpose of indemnifying the injury, but for the acts of those who are under his care as well. And so the father, and in the absence of the father, the mother is responsible for the acts of his minor children who inhabit the same house with him. And so the tutor or the curator is responsible for the conduct of the ward who lives under his care and dependency. And so the husband is responsible for the conduct of a wife. And so the directors of colleges and schools respond for the acts of their pupils while under their care, and the artisans and empresarios for the acts of their apprentices and their dependents (dependientes) in the same case.

"*But the responsibility of such persons shall cease if with the authority and care which their respective quality confers upon them and prescribes they should not have been able to prevent the act.*

"In all these cases the person charged with the care of another responds for the culpable and injurious acts of the other, provided he might have prevented the damages and did not do so; but if the damage results, notwithstanding that he has employed the indispensable prudence and care of a good father of family, then his responsibility terminates, because it would not be just nor equitable to demand from a person more than he can give, within human effort. All legal responsibility has its limit at the point where the unforeseen or inevitable begins.

"In the notes of Señor Bello, on the Civil Code of Chili, we find the following: 'For example, a coach collides with a person or breaks a window or door, due to the malice or negligence of the coachman. The master could have foreseen the damages that might be caused by a vicious inexperienced coachman, but if a coachman of habitual good conduct should become intoxicated upon one occasion and in that state runs against a pedestrian or insults him, the master not being present, or being present is disobeyed, what can be imputed to the latter?'

"Of course, when Señor Bello wrote the Civil Code of Chili, automobiles did not exist, and the calling of coachman, or chauffeur was not then regulated by the police authorities. Nevertheless, accommodating himself to the provisions to be found in the majority of the legislations of civilized countries he limited the responsibility of the master to the case in which he had selected for his servant a person disqualified or of bad conduct, as he very well explains it. That being so, it is evident that if the public authorities say to the master, through the medium of a certificate of qualification and good conduct, that he may trust his automobile to Pedro, who has been previously examined and who has given proof, before the competent authorities of his good conduct, the master is not responsible for the damages caused by Pedro because it is presumed that the

election that he made was correct, and that he could not foresee that the qualifications of Pedro would fail on a given occasion, and cause damage to a third person."

The Supreme Court of Panama then quotes from the decisions of the Supreme Court of Spain in support of the doctrine that when the master has exercised due care in the selection of his servants he is not responsible for the acts of the latter that could not have been foreseen or prevented. A full translation of the decision of the Supreme Court of Panama will be found on pages 167 to 193 of the appendix to this brief.

Counsel for the defendant in error has relied upon Article 5 of Law 62 of April 24, 1887, enacted by the Congress of the Republic of Colombia, to support the judgment of the trial court in this case. It may be well to set out the law in its entirety in this brief. The English translation of the law is as follows:

"Art. 1. The occupancy of public roads with railroads is prohibited.

"Notwithstanding such prohibition the Government may enter into a contract with the empresario of a railroad, by means of which the railroad may use the portion of the public road that may be indispensable, upon the payment of previous indemnification, along in such places where by reason of the brokenness of the ground it becomes necessary to occupy a part of the public road.

"Art. 2. Railroad enterprises are obliged to conveniently establish the service of the public roads which they cross in such manner that the traffic over the highways may not be interrupted or rendered dangerous by such railroad crossings, and they must take like precautions in respect to the private roads when crossing is made on a level.

"Art. 3. Whenever it becomes necessary to cross a public road, in the construction of a railroad, permission shall be asked of the Minister

of Fomento, in order that this official may resolve whether it is proper or not to grant the permit and that he may order what shall be done for the safety of the transit.

"Art. 4. The importation of Chinese for work in the territory of Colombia is prohibited, without prejudice to any stipulations that have been made with certain companies before the promulgation of this law.

"Art. 5. The empresarios of railroads are responsible for the wrongs and injuries which are caused to persons or properties by reason of the service of the said roads and which are imputable to want of care, neglect, or violation of the respective police regulations which shall be issued by the Government as soon as this law is promulgated.

Article 5 of the law relates to wrongs and injuries caused to persons or properties by reason of the service of railroads. The application of this law to the case now before this court is extremely doubtful. The operation of the bus in question by the Panama Railroad Company from the Administration Building of The Panama Canal to the Tivoli Hotel has no connection with the railroad proper. Neither has the Panama Railroad the right under its charter to operate busses. The bus line in question was established by Gen. George W. Goethals, Governor of the Panama Canal and President of the Panama Railroad Company on July 29, 1914, for the accommodation of the gold (white) employees of The Panama Canal and the railroad and their families, and the authority for the operation of these busses is found in the following letter:

"CULEBRA, July 29, 1914.

MR. C. H. MOTSETT,
Superintendent,
Cristobal.

"Sir: The matter of convenient transportation at Balboa is one that will require some attention. I do not desire to have any tracks for railroads or street cars through the town of Balboa or any closer to the Administration Building than they are at present.

"I think the best plan to take care of the needs of the people at Balboa will be to operate several busses, to make trips between Ancon Hospital gate, Hotel Tivoli, and various points in Balboa and Balboa Heights, these busses to be used by gold employees and their families only.

"As this will be a paid passenger service, I think the Panama Railroad Company should handle it, and you are therefore authorized and directed to requisition three motor busses suitable for carrying passengers upon the same general plan as the Fifth Avenue busses in New York. That particular type of bus may not be the most desirable for this country, but you can make your specifications broad enough to include bids for any type suitable for that kind of service. After you have received the bids and looked them over, I should be glad to see the ones which you consider most suitable before final decision is made.

Respectfully,

(Signed) GEO. W. GOETHALS,
President."

The action of General Goethals was acquiesced in by the Secretary of War. The Panama Railroad Company is owned by the United States. It was incorporated by special act of the legislature of the State of New York, passed April 7, 1849. The act of incorporation was amended on April 12, 1855, so as to grant to the

railroad wider borrowing power. The charter of the Panama Railroad Company granted to the incorporators the power to construct and maintain a railroad, with one or more tracks, and all convenient buildings, fixtures, machinery, and appurtenances, across the Isthmus of Panama, in the Republic of New Granada, under the grant made by the said Republic to William H. Aspinwall, John L. Stephens, and Henry Chauncey, and of purchasing and navigating such steam or sailing vessels as may be proper and convenient to be used in connection with the said road; and for such purposes all the necessary and incidental power was granted to the corporation. The corporation was also authorized to contract with William H. Aspinwall, John L. Stephens, and Henry Chauncey, for the purchase of all rights, privileges, immunities, etc., granted to them by the said Republic of New Granada, and for the purchase of the lands granted to them by the said Republic, and to receive a conveyance of, and hold the same in like manner as the said William H. Aspinwall, John L. Stephens, and Henry Chauncey did or could do; and to lease or sell and convey any and all of the lands which the corporation shall not deem it necessary to retain, and to build and construct all such buildings, piers, docks, basins, and harbors on the said lands as the corporation may deem expedient, in like manner as the said William H. Aspinwall, John L. Stephens, and Henry Chauncey could do under the said grant.

It will be noted that the charter did not grant to the incorporators the power to operate a bus line. The grant from the Republic of New Granada (now Colombia) to William H. Aspinwall, John L. Stephens, and Henry Chauncey, which was transferred by them to the Panama Railroad Company, and amendments to said grant, may be found set out at length in the English text in the report of Senator Bristow, Special Panama Railroad

Commissioner, to the Secretary of War, dated June 24, 1905, upon pages 296 to 335 thereof. The grant from New Granada, above mentioned, and the amendments thereto, did not confer upon the grantees the authority to operate a bus line. The line in question has no connection with the operation of the railroad.

The railroad company is being utilized as an adjunct of the Canal in the operation of the bus line, in conformity with the President's letter of May 9, 1904, addressed to the Secretary of War, already referred to, in the same manner that the Panama Railroad Company is now being utilized under Section 6 of the Panama Canal Act of August 24, 1912, and the Executive Orders of the President in the operation of commissaries, ice plants, bakeries, laundries, coal plants, agricultural, cattle and dairy farms, and other activities which have become necessary in the construction and operation of The Panama Canal.

It is true that some of the facts here stated do not appear in the record, but they all relate to the official acts of the officials and agents of the United States in charge of the Panama Canal and its adjunct, the Panama Railroad. We invite the court's attention to Section 293 of the Civil Code of Procedure of the Canal Zone. That section, among other things, required the courts to take judicial notice of the public and private and official acts of the legislative, executive, and judicial departments of the United States and the Canal Zone, and the courts may receive evidence on any of these subjects when it shall find it necessary for its own information, and may resort for its aid to appropriate books, documents, or evidence. The Code of Civil Procedure was issued in 1907, by authority of the President of the United States, and it has been ratified as

valid and binding by the terms of Section 2 of the said Panama Canal Act of August 24, 1912.

The provision of the Code of Civil Procedure of the Canal Zone just quoted is an unusual one in that part which requires the courts to take judicial knowledge of the public, private, and official acts of the various departments of the Canal Zone as well as of the United States. The reason for the provision is obvious. The United States came to the Isthmus to construct the Canal, and when completed, to operate it for the benefit of commerce. The Canal Zone is nothing more than a right-of-way for the Canal. In order that the Canal might be constructed and thereafter successfully operated it was necessary to establish an organization that would permit the desired ends to be accomplished without hindrance. Hence it was necessary to provide that all of the departments of the government in the Canal Zone must take notice of the activities connected with the construction and operation of the Canal.

Relying on the section of the Code of Civil Procedure above quoted, we shall not hesitate to refer to the public, private, and official acts of the various departments of the National Government, as well as of The Panama Canal.

Our only purpose in inviting the Court's attention to the fact that the operation of the busses has no connection with the operation of the railroad is to demonstrate the inapplicability of Article 5 of the Colombian Railroad law of 1887, above mentioned, to the facts of this case. We submit that the provisions of the Civil Code already quoted in this brief are applicable to the case, and that the said law 67 of 1887 is not applicable.

The defendant in error also relied on a decision of the Supreme Court of Bogota, rendered in the case of Cancino *vs.* The Railroad of the North, on December 16, 1897. A full translated copy of the decision will be

found in the appendix to this brief, pages 124 to 155. We call the Court's attention to the all-important fact that the judgment was not rendered against a railroad corporation, but against the empresario, General Juan Manuel Davila, that is to say, it was rendered against a natural person and not an artificial entity. The facts of that case were as follows:

It appears that the railroad company's management had been advised of the burning of other houses along the line of the railroad, prior to the burning of the house in question. Notwithstanding this information, the empresario neglected to provide his engines with spark arresters or take other measures to prevent the burning of houses by sparks from the engines. The court laid stress on the fact that the house in question was built prior to the construction of the railroad, and that it had a thatch roof like the other houses that had been previously burned. In other words, the empresario, General Davila, found the situation that needed attention when the road was built, and he took no precaution to prevent fires, and continued to be negligent after he had been advised of the burning of houses along the right-of-way, and it was these facts that caused the Supreme Court of Bogota to affirm the judgment against General Davila.

In discussing the case, the Court, in the majority opinion, said:

> These antecedents being determined the Tribunal, referring to the proof adduced, establishes the following:
>
> That the sparks thrown out by one of the locomotives of the Railroad of the North were what caused the fire, for the results of which the empresario is responsible, that the greater portion of the points of fact indicated by the complaint are proven. Therefore, the Tribunal forthwith proceeds to consider the point of law, reduced to

ascertaining if the concessionaire of the enterprise of the Railroad of the North is responsible civilly for the damages caused by the fire. Hence the study and application of the provisions of Articles 2341 and 2347 of the Civil Code, the violation of which has been alleged by the defendant and which is now the subject matter of the Court's examination.

It is evident that the provision of the last of these articles assigns the responsibility not only for a person's own acts but for the acts of another when these are executed by persons who are in the care or under the authority of others, in order that the latter may be responsible for the damages which the former may have caused to a third person, with the limitation and exception, however, that the responsibility of such persons ceases if by the exercise of the authority and care which their respective characters prescribe for and confer upon them they could not have prevented the act.

The tribunal in applying this provision to the facts of the suit, establishes the responsibility of the defendant as empresario of the Railroad of the North under whose authority the engineer of the locomotive which caused the fire was serving; and applying the rule contained in Article 1604 of the Civil Code, that "the proof of the diligence or care is incumbent on him who ought to have exercised it," the Tribunal deduces that the action having been directed not against the locomotive engineer of the railroad, but against the empresario, there is no necessity of ascertaining if there is a criminal responsibility on the part of the engineer, without, for that reason, pausing to consider if the civil action could have been instituted without regard to the criminal action, even before the existence of law 169 of 1896—because it takes notice of the existence of law 62 of 1887, which reads as follows:

> The empresarios of railroads will be responsible for the damages and injuries which they may cause to persons and

property by reason of the services of said roads and which may be imputable to carelessness, neglect, or violation of the police regulations which will be issued by the Government as soon as the present law is promulgated.

In spite of the provisions of this law, it is contended by the attorney for Davila that the engineer of the railroad company could not be considered as his dependent or subordinate (*dependiente*) but solely as his employee (*empleado*) and that for that reason he does not have to respond for the act which is being inquired into; but in the opinion of the Tribunal, if it is true that in order that the responsibility of which the Civil Code treats may exist, there ought at the same time to be a dependence (*dependencia*) between the empresario and the agent of the act, it is no less true that this dependence may be recognized as a matter of law, nor is it necessary that the dependence be absolute: it suffices if the act be executed by reason of the service entrusted to the individual who serves under the empresario, for in all the functions with which he is charged he preserves the character of a dependent (*dependiente*) of the empresario.

Without questioning the correctness of this doctrine of the Tribunal, because the dependence or subordination of one man to another can not be absolute but only relative, it is clear on the other hand that the provisions of article 5 of law 62 of 1877, above quoted, without in any way mentioning the dependents, employees, or workmen of railway enterprises, makes their empresarios responsible for the damages and injuries which they may cause to persons or to property by reason of the services of the said roads.

For the rest, it is perfectly shown in the record that the house destroyed by fire already existed at the side of the road through which the railway was constructed, a circumstance which it is important for the Court to consider, because un-

> doubtedly the aspect of the case would differ notably if the house had been constructed after the establishment of the railway line; and it was easy to foresee that this house as well as the others destroyed by fire, being thatched with straw, were in imminent danger of this fate from sparks thrown out by the locomotives, and that some diligence and care were indispensable in order to avoid it; and there is not in the record any proof whatever that any care or precaution, either on the part of the empresario or the engineer, had been taken to prevent the fire, the proof that the empresario on his part had exercised much care in the selection of his employees not being sufficient, in the opinion of the Court, because the diligence and care here treated of, is that which ought to have been exercised in order to prevent an injury that could have been easily foreseen; and if it is also taken into account that the record shows that the railroad caused the burning of five houses in a space of less than one kilometer, and this on different dates and at different hours, it must be deduced that not only was there no diligence or care to avoid a repetition of the damage, but that the matter was looked on with a certain amount of indifference; and apropos of this the Tribunal points out that it was not even proved that the locomotive in question was provided with the apparatus known by the name of "spark arrester" (*guarda chispas*), which, though it may not completely prevent the emission of sparks at least diminishes their number and tends to prevent the throwing out of the larger ones.

In that case there was a direct responsibility in the empresario, brought home to him personally, and consequently a discussion of other points not relative to the true issues are without persuasive force. The statement by the Court that the aspect of the case would differ notably if the houses had been constructed after the

establishment of the railway line indicates very clearly that if the facts just referred to had not existed within the knowledge of the empresario, he would not have been held responsible for the act of the engineer in charge of the engine that caused the damage.

The Supreme Court of Bogota in the Cancino case held that law No. 67 of 1887 was complementary of Article 2347 of the Civil Code. It did not repeal that article or modify it. It simply added another class of cases in which a recovery might be had. The provision of Article 2347, as well as that of 2349, which provided that the responsibility shall rest upon the servant or employee, and not upon the master or principal, if the latter has exercised due care and competent authority, and that the act of the servant or employee could not have been foreseen or prevented by the master or principal, remained unimpaired, even in respect to cases properly coming under the provisions of Section 5 of Law 67 of 1887. That would seem to be the gist of the opinion of the Supreme Court of Bogota in the case just quoted.

We submit that not only the instruction contained in the President's letter to the Secretary of War, but established principles of international law as well required the trial court to adhere to the laws and jurisprudence of Colombia and Panama, referred to in this brief; but if for any reason the courts of the Canal Zone must resort to the jurisprudence of the United States for aid in the decision of cases, it would seem necessary and proper for the local courts to accept decisions emanating from the courts of the United States that best conform to our local system of laws.

Decisions of the courts of the various States of the Union may be found announcing principles somewhat similar to those involved in the Colombian and Panamanian cases cited in this brief.

We respectfully refer the Court to the case of Isaacs *vs.* Third Avenue R. R. Co., reported in 47 New York Reports, page 122. I quote the following facts in the case taken from the syllabus:

> "Plaintiff, a passenger upon defendant's car, desiring to alight, passed out upon the platform and requested the conductor to stop the car, and refused to get out until the car had come to a full stop; whereupon, and while the car was in motion, he threw her from the car with great violence out upon the pavement, thereby she was seriously injured."

It will be noted that the plaintiff was a passenger on the car, and in consequence she was entitled to all consideration due a passenger who was traveling under contract of transportation. In passing upon the case the Court of Appeals of New York said:

> "In the present case an act was done by the conductor completely out of the scope of his authority, which there can be no possible ground warranted by the evidence for supposing the defendant authorized, and which it could never be right under any circumstances for the defendant to do. 1st. The car was in motion, and for no cause could the plaintiff have been thrust out into the street against her will while the car was in motion. The law forbids it, and the defendant could not lawfully have done it, and therefore no authority could be implied in the conductor to do it. 2d. There is no pretense that the conductor ejected or put the plaintiff from the car, or claimed to exercise such power for disorderly conduct, nonpayment of fare, or any other cause. 3d. The act was not in aid and assistance of the plaintiff in leaving the car. She was not in the act of getting off the car, but was standing on the platform, demanding that the car should be fully stopped, and protesting, as she had a right to do, that she would not attempt to leave the car while

> they were in motion. 4th. The act was wanton and reckless, and was committed with great force and violence, such force as to throw the plaintiff clear off and over the step, and on the pavement. It was not in the performance of any duty to the defendant, or by any act authorized by it. *It was a criminal act for which the conductor could have been punished criminally as well as made to respond in a civil action.* It was wanton and wilful trespass, and was not the natural or necessary consequence of anything which the defendant had ordered to be done."

In support of this ruling the New York Court cites the case of the Thames Steamboat Co. *vs.* Housatonic R. R. Co., 24 Conn., 40 (pp. 128 and 129 of opinion).

The United States Circuit Court of Appeals at New Orleans sustained the judgment of the trial court in this case upon the ground that:

> "Corporations act only through agents, and every act of an authorized agent within the scope of his employment is, therefore, the act of the company." (Pp. 39 and 40 of the record.)

The doctrine announced by that Court is well recognized in the laws and jurisprudence of the United States, but it is not always easy to determine whether the act of the agent is authorized and within the scope of his employment. The doctrine of respondeat superior has a much broader scope in the United States than it has under the laws and jurisprudence of Colombia and Panama. In respect to the torts committed by the agents or servants of corporations, the doctrine in the Canal Zone is defined and limited by Articles 2347 and 2349 of the Civil Code of the Canal Zone. The limitations upon the doctrine found in those two articles does not prevail in those jurisdictions in the United States which have systems of laws not based on the civil law;

and we respectfully submit that the jurisprudence of the Isthmus of Panama does not authorize the broad statement made by the Circuit Court of Appeals.

ASSIGNMENT OF ERROR NO. 2.

The Circuit Court of Appeals erred in affirming the judgment of the District Court of the Canal Zone in holding that the plaintiff in error was responsible in damages for the wrongful act of the operator of its motor bus, which caused the injury to the defendant in error.

We respectfully refer the Court to the authorities and suggestions presented by us under our first assignment of error in support of our second assignment of error.

We wish to add to what we have said under the first assignment of error that the evidence adduced upon the trial would seem to support the plaintiff in error's theory that the accident was due to the action of the colored man on the bicycle, who appears to have been weaving in and out from the people who were walking along the road, and that he obstructed the transit of the bus, and the injury to the defendant in error resulted solely from the fact that the chauffeur was compelled to turn the bus suddenly in order to prevent it from running over the colored man, and, therefore, the plaintiff in error was entitled to a directed verdict upon the facts of the case.

ASSIGNMENT OF ERROR NO. 3.

The said court erred in affirming the judgment of the said District Court of the Canal Zone in instructing the jury that if the plaintiff in error be found responsible for the injury to the defendant in error, damages to be allowed should include damages for the mental and physical pain and suffering of the said defendant in error as a consequence of the injuries described in the complaint.

This assignment of error was based upon the following instruction which was given in charge to the jury by the trial court:

> "If you find for the plaintiff you will then consider the damages to which you consider he is entitled. When it comes to pain and suffering it is impossible to put that in dollars and cents as you would a contract; and yet pain and suffering is an element recognized by the law, and one left to the intelligent judgment and discretion of honest, intelligent, American jurors. You are entitled to consider pain and suffering as an element of damages."

This charge was duly excepted to. (Pp. 29 and 30 of the record.)

We desire to add that the plaintiff in error interposed a special demurrer to that part of the plaintiff's complaint, wherein mental and physical pain and suffering were set up as an element of damage. (P. 4 of the Record.) And upon the overruling of the demurrer, plaintiff in error's exception was duly noted. (P. 8 of the record.) And again we respectfully call the Court's attention to the fact that the plaintiff in error requested the Court to instruct the jury that the defendant in error was not entitled to recovery for physical pain and suffering, which request was overruled by the Court and an exception duly noted. (P. 28 of the record.)

The Panama Railroad was completed across the Isthmus of Panama in 1855. From that day to the present time no recovery of damages for physical pain and suffering has been had in the Superior Courts of Colombia or Panama against the Panama Railroad. No such recovery has been had against anyone in the courts of these two countries since 1855 to the present time, or previous to 1855. The rule by which damages for physical pain and suffering, or moral damages as it is called by Colombian and Panaman lawyers, are allowed is

unknown to the laws and jurisprudence of Colombia and Panama.

No recovery of damages for physical pain and suffering in any case was had in the courts of the Canal Zone until judgment was rendered in the Fitzpatrick case against the Panama Railroad by the Supreme Court of the Canal Zone, under the old organization, on January 31, 1913, that is to say, the doctrine in question was unknown in the courts of the Canal Zone from May, 1904, when our government took possession of the Canal Zone, until January 31, 1913.

Fitzpatrick was injured in a collision between a passenger train of the plaintiff in error and one of the plaintiff in error's light engines. He suffered serious bodily injuries.

We have already quoted from the Fitzpatrick case (p. 20 of this brief), for the purpose of showing that the decision was influenced by the jurisprudence of the United States, rather than that of Colombia or Panama. In that case the railroad company contended that the trial court should not have allowed damages for physical pain and suffering. The contention was overruled, and the Court's action seems to have been based largely upon the assumption that the Supreme Court of the Canal Zone in the case of Reese *vs.* Shay, had laid down a contrary doctrine. (Reese *vs.* Shay, Vol. 2, Canal Zone Supreme Court Reports, p. 72.) In referring to the case the Court said:

> "In that case it was held that an action of slander could be maintained in the Canal Zone without allegations of any special or pecuniary damages arising therefrom."

It is suggested that the point in the case of Reese *vs.* Shay arose upon a demurrer to the complaint. The Court simply held that an action of slander could be maintained in the Canal Zone, but nothing was said in

that case as to the elements of damages. That would have been a matter of proof. Damages for libel and slander can be recovered under the law and jurisprudence of Colombia and Panama, but in order to obtain a recovery the complaining party must submit proof that he has suffered material or economic damages.

The ruling in the Fitzpatrick case seems to rest also on Section 42 of the Code of Civil Procedure of the Canal Zone, which provides that actions for injury to the person; action for libel or slander; for assault, battery, malicious prosecution or false imprisonment, or for injuries resulting therefrom; action upon a statute for a penalty or forfeiture; shall be brought within one year after the cause of action accrued. We submit that there is nothing in this section of the Code of Civil Procedure to authorize a recovery of damages for physical pain and suffering. It needs no argument to show that the right of action is provided in the substantive law, and the elements of damage are prescribed in the substantive law. Section 42 of the Code of Civil Procedure relates to the manner in which the substantive right is to be enforced.

The ruling of the Fitzpatrick case also rests upon the decisions of the Supreme Court of Louisiana and Porto Rico, and a number of decisions from the Federal Court of Porto Rico and the Supreme Court of Louisiana are cited by the Canal Zone Court to support its conclusion. We will refer to these rulings later on in this brief. For the moment we desire to discuss the question in the light of the laws of the land with which the people on the Isthmus are familiar.

The Circuit Court of Appeals, in disposing of the issue presented under our third assignment of error, spoke as follows:

> "Under the jurisprudence of the Canal Zone, and we think a proper interpretation of Section

> 2341 and 2356, damages for physical pain and suffering are recoverable." (P. 40 of the record.)

This was all that was said by the Circuit Court of Appeals upon the point at issue.

If the Circuit Court of Appeals had in mind the decision in the Fitzpatrick case and subsequent rulings of the Canal Zone Courts when it spoke of the jurisprudence of the Canal Zone, we agree with the statement, but if that statement had reference to the laws of the land with which the people on the Isthmus are familiar, then we most respectfully dissent.

Articles 2341 and 2356 of the Civil Code, referred to by the Circuit Court of Appeals, authorize a recovery of damages in proper cases, but those two articles can not be cited in order to determine the measure of damages recoverable in any case.

The measure of damages under the Civil Code of Panama, which is also the Civil Code of the Canal Zone, is defined and limited by Articles 1613 and 1614. Article 1613 reads as follows:

> "The indemnity for damages comprises the emergent damage and the ceasing income, whether arising from the nonperformance of the obligation or its imperfect performance, or through delay in performance.
>
> "Such cases are excepted in which the law expressly limits the indemnity to the emergent damage."

And Article 1614 reads as follows:

> "By emergent damage is understood the damage or loss arising from the nonperformance of the obligation or from its imperfect performance, or delay in its performance; and by ceasing income the profit or benefit which ceases to be received as a consequence of the nonperformance of the obligation, its imperfect performance or delay in performance."

These two articles of the Civil Code have not been relied on either by the courts of the Canal Zone or the Circuit Court of Appeals, so far as we are aware, in passing upon the issue here presented. Civil suits for damages based upon torts involving negligence are extremely rare in Colombia and Panama, doubtless, due to the fact that in most cases where personal injuries are received as a result of a negligent act, the offending party is guilty under some provision of the penal laws, and in accordance with Colombian procedure, the injured party obtains his civil damages by the same judgment which declares the offending party guilty of the criminal offense. Hence, we must look to the jurisprudence that has developed in connection with criminal cases in order to ascertain what has been the rule of the courts of Colombia in respect to the measure of damages in cases similar to the one now before this court.

Dr. Fernando Velez, the leading Colombian commentator on the civil code, quotes with approval the language of Señor Vera, the Chilean commentator on the civil code, as follows:

> "If the act committed is an offense prescribed and punished by the penal law, the obligation which arises from it not only includes the indemnity or payment of the damage caused, but also carries with it as a precise and necessary consequence the burden of the penalty imposed by law. Thus, for example, if the offense is a homicide, the delinquent is obliged to pay all of the expenses incurred in the assistance rendered the deceased; his funeral expenses, and what may be necessary for the subsistence of the wife and children of the deceased, the judge trying the case being the one who will regulate these indemnities and the manner of satisfying them. If the crime is one of wounds or of physical offenses, the indemnity shall consist of the payment of all cost of the cure and convalescence of the injured

> party and of all of the profits that he may have lost up to the time of the complete restoration of his health." (Estudio Sobre El Derecho Civil Colombiano, por Fernando Velez, Vol. IX, pp. 13 and 14.) [The translation is ours.]

Again, the same writer, in speaking of the measure of damages, says that indemnity due to the one who received an injury to his person or property, should be subject to the general rules of law applicable to ordinary suits except special cases, and refers to Article 1613 of the Civil Code. (Velez, etc., Vol. IX, p. 13.)

Let us apply these principles to the case now before the Court. If Kirkbride, the chauffeur, were being prosecuted in the Colombian Court for a violation of the penal laws prohibiting the driving of motor cars at an excessive rate of speed and were found guilty of the offense, the only civil damages that the injured party could have recovered against him in that proceeding are those mentioned by Doctor Velez, that is to say, reimbursements for all costs of the cure and convalescence and for all that Bosse may have lost up to the time of his complete restoration to health, and the ceasing income, if any, but not one cent for mental anguish and physical pain and suffering, or as it is called in Colombia and Panama, moral damages.

The Supreme Court of Panama has rendered two decisions that seem to support the contention here made by us that damages for physical pain and suffering, or moral damages, can not be recovered under the law and jurisprudence of Colombia and Panama. On May 11, 1917, that court rendered a decision in a suit instituted by Mr. Harry Compton against Rosendo Alvarado, demanding the sum of $5,000 damages for physical injuries received by the former on account of being run over by the automobile of the latter, who was driving the machine at the time. The trial court ren-

dered a judgment against Compton, on the ground that the evidence did not show facts from which the damages claimed might be deduced. During the trial in the first instance, three appraisers were appointed, in accordance with Panamanan procedure, to assess the damages. One of these fixed the damages at $100 hospital expenses, the only expenses which he took into account; another appraiser, after going into many considerations touching the material and moral damages inflicted on Compton and his family, fixed the damages at $10,000; and the remaining appraiser declined to render a verdict, because he was not informed as to the material damages that Compton may have suffered or the expenses incurred by him to effect his cure. On appeal, that is to say, on the second instance, the Supreme Court of Justice of Panama rendered judgment to the effect that the defendant was liable to Compton for any material damages that he may have suffered. We will quote the following pertinent paragraphs from the Court's opinion:

> "The assessment of damages by the experts in this case is very deficient, because an assessment made tentatively can not be accepted, and even this proof is incomplete by reason of the fact that the two experts named by the parties were in total disagreement and the other refrained from expressing his judgment. The folowing results from this situation: The defendant can not be absolved, because it has been proven that damages were sustained, and neither can the defendant be condemned capriciously to the payment of a sum certain. Therefore, it would seem equitable and legal to remit the parties to another suit in which the only thing to be proven is the amount of damages. Therefore, administering justice in the name of the Republic, and by virtue of the law, the Supreme Court revokes the sentence of

> the trial court and condemns Rosendo Alvarado to pay to Harry Compton the sum that may in a separate trial be proven to be the amount of prejudice suffered by him on account of the material damage suffered and by way of ceasing income (*lucro cesante.*)"

The Spanish text of the above-mentioned decision will be found in the Registro Judicial of Panama of June 6, 1917, Volume XIV, No. 38, pages 357 to 360, and a full English translation thereof will be found on pages 156 to 167 of the appendix to this brief.

It will be noted that the damages to be ascertained in a separate proceeding are limited to the material damage and ceasing income or *lucro cesante.* No moral damages seem to have been allowed.

The Supreme Court of Justice of the Republic of Panama, on the fifth day of October, 1918, rendered a judgment in favor of Emilia Orozco against the Panama Electric Company, and awarded her material damages for the wrongful death of her son, who was her sole support, caused by one of the tramcars of the defendant company. A full translation of the court's decision will be found on pages 167 to 193 of the appendix to this brief.

We will quote the pertinent parts of the decision which relate to the measure of damages:

> "In respect to the appraisal of the damages, the expert Ernesto de la Guardia estimated them at 3,600 balboas; the expert Jorge L. Paredes at 1,200 balboas; Claudio Z. Harrison at 1,000 balboas; Rodolfo Castro at 1,200 balboas; Julio Quijano at 3,000 balboas; J. D. Arosemena at 5,000 balboas, including moral damages, and in 2,500 balboas the material damages alone, Eduardo F. de la Guardia at 1,275 balboas; and Enrique de la Ossa at 1,031 balboas, the material damages, and in the same sum the moral damages.

"The experts Paredes and Castro are employees of the defendant company, and the expert Harrison is an employee of the attorneys for the enterprise, and, consequently, their findings are lacking in the independence indispensable in such cases.

"In view of the diversity of the opinions among the experts, and of the fact that, in accordance with Article 854 of the Judicial Code, the findings of the experts are not of themselves full proof, and that such proof must be appreciated by the Tribunal in rendering final judgment and taking into consideration the reasons on which the findings of the experts are based and the other proofs that appear in the record, the court assesses the indemnity for the injury at the sum of 2,000 balboas, material damages, and in doing this the court has taken into consideration Masa's age (30 years), the age of his mother (50 years), the circumstances that he was a good son, who divided his salary with his mother, with his children, and with his concubine who lived together in community; that he earned on an average of 30 balboas per month, and that of this he could give his mother 15 balboas per month. Calculating that Emilia Orozco might live 11 or 12 years more the material damage that she suffered from the loss of her son, should be estimated in the sum already expressed, inasmuch as there is no other more scientific basis for its ascertainment.

"In the complaint nothing is said of injuries on account of moral damages, and in none of the material allegations of the action are moral damages considered. If the plaintiff had desired to submit that question she should have done so in due form, that is to say, state clearly in what amount she estimated the damages for the material injury and in what amount the moral injury.

"However, as the attorney for the plaintiff in his argument upon the second instance insisted upon reparation for the moral damages suffered

> by the plaintiff, the court has examined the point, and has reached the conclusion that neither the legislation in force up to the 30th of September, 1917, nor that in force at the present time, authorizes the inclusion of the moral damage in the appraisal of the injuries, and that there is no existing jurisprudence establishing such a doctrine in the tribunals of Colombia, nor in those of Spain from whence the civil and penal codes now in force were derived."

The Civil Code of the Canal Zone is a re-enactment of the Chilean Civil Code, with some modifications.

The doctrine that only material damages may be recovered seems to prevail in Chile also. Doctor Velez, the commentator on the Civil Code of Colombia, already referred to, quotes the following pertinent article from the Civil Code of Chile:

> "Article 2331. Slanderous imputations against the honor or credit of a person do not give a right to a cause of action for pecuniary indemnity, unless emergent damages or ceasing income, which may be appreciated in money, is proven; but not even then shall the pecuniary indemnity be recovered if the truth of the imputation is proven. (Velez, etc., Vol. IX, p. 17.) [The translation is ours.]

Damages for physical pain and suffering are not allowed under the laws and jursprudence of the Philippines.

Article 1902 of the Civil Code of the Philippines contains substantially the same language as that of Article 2341 of the Civil Code of the Canal Zone. It reads as follows:

"A person who by an act or omission causes damage to another when there is fault or negligence shall be obliged to repair the damage so done."

The meaning of this language was construed by the Supreme Court of the Philippines in the case of Marcelo *vs.*

Velasco. (11 Philippines, p. 287.) The facts of the case are as follows: The plaintiff was in the store of the defendant in the City of Manila, making purchases; pieces of iron fell upon her, breaking both legs. She was carried to the hospital and remained there about seven months, when she left cured, being able to walk without assistance and without any apparatus to support her, but slightly lame. She sued for 20,000 pesos, and recovered the sum of 2,368.24 pesos. The sum was made up of 1,813 pesos, the amount of doctors' bills and hospital bill, and 555.24 pesos, the amount which the plaintiff lost by not being able to devote herself to her usual business during the time while she was in the hospital. From the judgment the plaintiff appealed. The defendand did not appeal. The plaintiff, on appeal, insisted that damages should have been allowed her for the pain which she suffered at the time of the accident and during her stay in the hospital. The court allowed her nothing on this account. The Supreme Court of the islands sustained the rulings of the trial court. Inasmuch as the decision is squarely in point it may be well to set out here in full the part which relates to the claim for damages on account of the physical pain suffered by the plaintiff.

> "As we understand the third assignment of error, the plaintiff thereby insists that damages should have been allowed her for the pain which she suffered at the time of the accident and during her stay in the hospital. The court allowed her nothing on this account.
>
> "The action is brought under the provisions of Article 1902 of the Civil Code, which is as follows:
>
> > " 'A person who by an act or omission causes damages to another when there fault or negligence shall be obliged to repair damage so done.'

"Manresa, in his Commentaries on the Civil Code, speaking of this article, says (Vol. 12, p. 604):

> " 'The obligation imposed by said article comprises the two items or the two terms that are present in every indemnity, in accordance with Article 1106 of said code, that is, the amount of the loss which may have been suffered, and that of the profit which a person may have failed to realize. Thus has the tribunal, so often cited, settled the matter in its decision of the 15th of January, 1902.'

"Article 1106 is as follows:

> " 'Indemnity for losses and damages includes not only the amount of the loss which may have been suffered, but also that of the profit which the creditor may have failed to realize, reserving the provisions contained in the following articles:'

"For the profits which the plaintiff failed to obtain spoken of in the latter part of this article the plaintiff was allowed to recover, and the question is, whether the value of the loss which she suffered can be extended to the pain which she experienced by reason of the accident. We have found nothing either in the judgments of the Supreme Court of Spain or in any of the commentaries which would permit such a recovery. The phrase *á reparar el daño causado* (to repair the damage caused), found in the Article 1902 of the Civil Code, above quoted, is also found in Article 119 of the Penal Code. Articles 119 and 121 of that code are as follows:

> " 'Art. 119. The civil liability, established in Chapter II, Title II, of this book, includes: (1) Restitution; (2) Reparation for the damage caused; (3) Indemnification for losses.'
>
> " 'Art. 121. The reparation shall be made by the appraisal of the amount of

> damages by the Court, taking into consideration the value of the thing, whenever possible, and the value as a keepsake to the party aggrieved.

"Viada, in his Commentaries on the Penal Code, speaking of Article 121, says (Vol. 1, p. 539):

> " ' * * * * * with regard to the offense of *lesiones*, for example, the civil liability is almost always limited to indemnity for damages to the party aggrieved for the time during which he was incapacitated for work: * * * (*See also* same Vol., p. 546.)'

"In the judgment of December 6, 1882 (27 Jurisprudencia Criminal, 414) the Supreme Court of Spain, in a criminal proceeding for slander, said:

> " * * * inasmuch as the value of honor is a thing that can not be appraised, it is not possible to fix the amount of damages, nor can the payment of an indemnity be imposed upon the offender under Article 18 of the code, by way of civil liability arising out of the criminal act.'

"*The fact that in the United States damages are allowed in this class of cases for pain and suffering can not affect the resolution of the question here.* [The italics are ours.]

"This question has never been before considered by this court. In the case of Rakes *vs.* The Atlantic, Gulf, and Pacific Co. (7 Phil. Rep., 359), nothing was said with reference to this point, and the damages there allowed by the court below and by this court might well have been given by reason of the permanent injury which the plaintiff suffered, he having lost a leg as a result of the accident. The case of TGuioc–Co. *vs.* Del Rosario (8 Phil. Rep., 546) related to the damages which

> the heirs might recover for the death of their relative, a different question from the one raised in this case.
>
> "We hold, therefore, that this assignment of error can not be sustained and that no damages can be allowed for the pain and suffering which the plaintiff experienced at the time and after the accident.'

The decision of the Supreme Court of the Philippines was rendered by five justices, three of them being Filipinos and two of them Americans, and the opinion was written by one of the Americans. We especially invite attention to the language of the court in the following paragraph:

> "The fact that in the United States damages are allowed in this class of cases for the pain and suffering can not affect the resolution of the question here."

The Civil Code of the Philippines is the same as that of Spain, and the Supreme Court of the islands looked to that country for light to aid it in construing the code. As has been aptly said, we can not know the law, without knowing the reason of the law, and we can not know its reason without knowing its history.

It is a well-settled principle of Spanish jurisprudence that damages which in their very nature are uncertain, indefinite, and unreliable as an element in the computation of damages are not recoverable. Don Pedro Saenz-Hermua y Espinosa, a distinugished law writer of Spain, in his *Diccionario Recopilador de los Puntos de Derecho* gives some very pertinent citations from the decisions of the Supreme Court of Spain on the subject of damages. The following translations from his work are ours:

> "In order that the preceding legal doctrine may be applied, it is indispensable that effective injury shall have been suffered by means that are

condemned, and that the existence of the damage be proven." (Vol. 1, p. 140 of the above-mentmentioned dictionary.)

Again he says:

"When there is no certainty respecting the import of the damages caused, a solid foundation on which to appraise them is lacking." (Vol. 1, p. 140 of the said dictionary.)

Again, on the same page and volume of his work, the says:

"It is not possible to award damages for injuries caused where there do not exist means adequate to resolve the nature, extent, and determing cause of an abuse which is supposed to have caused the damages."

The Civil Code of Spain is not only in force in the Philippines, but in Cuba as well, and the decisions of the Cuban Supreme Court on the meaning of Article 1902 of the Spanish Civil Code in respect to the damages allowed thereunder, demonstrate that the conclusion reached by the Supreme Court of the Philippines in refusing to consider physical pain as an element of damages, was correct.

A case was brought in the courts of Cuba for the recovery of damages on account of the death of the plaintiff's mother, who was asphyxiated by escaping gas, due to the defective piping of the defendant company.

Under the Spanish law of civil procedure in force in Cuba, the damages, if awarded, may be assessed in the judgment awarding them, or they may be found by agreement of parties, after the main judgment has been rendered, or in case of disagreement respecting the amount, they may be appraised by a special proceeding subsequent to the main judgment. (See Articles 927 to 936, Law of Civil Procedure for Cuba and Porto Rico. War Department Translation.)

The plaintiff in the above-mentioned case failed to prove a pecuniary loss as a consequence of his mother's death, but he insisted that as her death was a result of the defendant's fault or negligence, he was entitled to a judgment awarding him damages, the amount to be assessed in the manner prescribed by the Cuban Law of Procedure.

The trial court ruled against him upon the ground that he had not shown that he had suffered any economic or pecuniary loss as a result of his mother's death, though he was her legal representative. He petitioned for a review of the case, by the Supreme Court of Cuba, upon the following grounds: [The translation is ours.]

> "*First.* In accepting the first conclusion (considerando) set out in the judgment of the Señor Judge of the First Instance, who declared that in order that an action sounding in damages may prosper it is necessary that the amount be proven, the trial court infringed the legal doctrine in virtue of which payment of damages may be imposed without fixing their import in a liquidated amount when the cause from which the indemnity for damages and injuries resulted is shown, and the basis for the liquidation may be established or may not be established, in which latter case the liquidation will be reserved to be ascertained by the means established under the law of civil procedure, Articles 927, 929, and 930, which doctrine, sustained by jurisprudence, appears to be clearly and precisely deduced from the context of said precepts and procedure, which, without such doctrine, would have no practical application.
>
> "*Second.* And also because the court accepted the second conclusion (considerando) set out in the judgment of the Juzgado of the First Instance, in which it is stated that although 'it has been undoubtedly proven as a fact of record that the death of Doña Peregrina Maimó or Mimó, was occasioned by poison, as the immediate result of

escaping gas, it is no less certain that the plaintiff has not proven that that lamentable occurrence, surely of an inestimable moral value for him, has caused him any loss of an economic order that may be repaired.' In reaching such a finding upon the facts an error of law has been committed, inasmuch as Article 1902 of the Civil Code, in establishing the responsibility for damages, does not require that this shall be precisely and purely economic, though, in order to repair it, it may be necessary to value it in money, when that is possible; and there has also been committed an error of fact in supposing that the only thing claimed by the plaintiff is indemnity for the damage incurred by the death of his mother, it being shown by the complaint and brief of the plaintiff that he makes his claim principally in the character of an heir of Doña Peregrina Maimó for the reparation of the damage caused to her by the escape of gas, which was so grave and transcendental as to result in her death, and which damage is irreparable; but it is susceptible of valuation in money and it is the practice of the Tribunal of Justice to act accordingly for the purposes of ascertaining the indemnity; the aforesaid character of heir being shown by a proper certificate of his declaration of heirship, issued by the Escribano of the Juzgado of the Este, of this city, Don Julio E. Romero, which accompanies the complaint, and which could not have been attached with any other end in view than that expressed, and therefore the fact in respect to which the error has been committed appears by authenticated documents, which show the apparent mistake of the Court

"*Third.* And the Court also erred by declaring in the second of the nine conclusions (considerandos) set forth in relation with the first conclusion, to the effect that it is not shown in the record that the plaintiff had proven the existence, real and tangible, of the material loss going to make up the economic damage for which a pe-

cuniary indemnity is solicited, and that it is to this material loss that reference is made by the legislator in Article 1902 of the Civil Code. In consequence this article (1902) and Article 1903 of the same code are violated; and the Court has committed the same errors of law and of fact as set out in the second ground of this recourse."

The ruling of the trial court was affirmed by the Supreme Tribunal of Cuba in the following language:

(Translation.) "*First Conclusion* (Considerando): The allegation contained in the first ground of this recourse, that upon proof of the cause from which a claim for damages and injuries results, judgment therefor may be rendered without fixing the import in liquidated amount, requires, in order that it may be efficacious, the assumption that the damages for which indemnity is claimed exist beyond doubt; and inasmuch as that supposition is found to be in contradiction with the opinion of the trial court which, correctly appreciating the proof, found that the record fails to show the damages which the plaintiff affirms have been occasioned to him by the irremedial misfortune which he laments, in consequence the allegation is lacking in merit.

"*Second Conclusion:* In respect to the second and third grounds of the recourse, the court has not incurred error of fact in failing to find that the plaintiff in this suit has made his demand in the character of heir of Peregrina Maimó, for the recovery of damages caused to her, inasmuch as in his complaint he has concretely formulated the petition, reproduced in his replication, that the defendant company be condemned 'to indemnify plaintiff for the damage he has suffered by the death of his mother;' and as the errors of law set out in the one or the other ground of the recourse, and, attributed to the court, have no other foundation except the very wide latitude given by appellant to the word damage (daño), contained in Articles 1902 and 1903 of the Civil Code,

which articles do not refer in any manner to the value or efficacy of mediums of proof, nor to the form in which this should be appreciated, and these are the only precepts that might have been infringed in respect to the point at issue; consequently it would seem that the question is not in respect to the appreciation of the proof, but rather relates to the meaning of the articles mentioned; and therefore the issue presented has been erroneously based on the seventh clause of Article 690 of the law of civil procedure; in consequence the two grounds cited are manifestly not well taken.

"*Third Conclusion:* That for the reasons stated the court proceeds to declare the recourse without merit, and to apply the precept of Article 40 of the order on the subject of cassation, with the costs against the recurrent." (See case of Mariano Esteban y Maimó *vs.* The Spanish-American Light and Power Company, Vol. 19, pp. 433 to 435, Jurisprudencia del Tribunal Supremo, República de Cuba.)

The Canal Zone courts rely in part on the decisions of the Federal Court of Porto Rico to sustain their rulings in allowing damages for physical pain and suffering. It is true that the Federal Court of Porto Rico does allow compensation for mental and physical pain and suffering, but an examination of the decisions of that court will demonstrate that the rulings are based upon American jurisprudence. Section 1073 of the Civil Code of Porto Rico, as reenacted, provides that indemnity for losses and damages is the amount of the loss which may have been suffered, and the profit which the creditor may have failed to realize. It is in substance the same as the provisions of Article 1106 of the Civil Code of Spain. The Supreme Court of that country, under this same law, has held that damages for injured honor are not allowed in a libel cause; and that when there is no cer-

tainty as to the nature or extent of the injury caused, a solid foundation for the valuation thereof is lacking.

We suggest, however, that the law of damages of Porto Rico has undergone some changes since the American occupation of the island The Assembly has passed laws authorizing actions for libel, and actions against municipalities for damages for personal injuries resulting from defective highways, etc., an employers' liability act, and some other similar legislation. All of these new laws were reenactments of laws from the various States of the United States, and consequently in applying them, the courts of Porto Rico have been largely influenced by the decisions of the American courts. But no such condition exists here. It is true that the Federal Employers' Liability Act is applicable to the Canal Zone, but this is not a case arising under that Act.

The Supreme Court of Porto Rico also allows a recovery of damages for physical pain and suffering and in this respect that Court is not in harmony with the ruling of the Supreme Court of the Philippines.

The doctrine which allows a recovery of damages for physical pain and suffering was first adopted by the Supreme Court of Porto Rico in the case of Diaz *vs.* The San Juan Light and Transit Company, reported in volume 17, page 64, of the Reports of the Supreme Court of Porto Rico.

The Diaz case was decided largely on the fact that the Civil Code and other laws, prevailing in Porto Rico during the Spanish régime, were replaced by laws enacted by the Assembly of Porto Rico under American sovereignty, yet the Court concedes that Section 1803 of the Revised Code is the same as Article 1902 of the Spanish Civil Code. But the court says that as "the Spanish word *daño* was translated to the English word 'damage,' its signification should be fixed by construing the same in harmony with the fundamental change brought about

in our institutions, the more so as said signification is not contrary to that established by the former jurisprudence, but is more ample and liberal, more just and equitable." We suggest that the court overlooked the important fact that the Revised Code of Porto Rico was enacted in the Spanish as well as the English language, though the English text might be preferred in case of irreconcilable conflict between the two texts. The Spanish word *daño*, of course, is retained in the Spanish text of Article 1803 of the Revised Code. In view of the fact that the Code was enacted in the two languages, and is applied among a people 90 per cent or more of whom are Spanish speaking, it could hardly have been the intention of the Assembly of Porto Rico to give the meaning of the word *daño* an interpretation different from that obtaining in Spain, simply because the word "damage" was used for the Spanish word *daño* in the English text of the law. We are not without authority on the point. In the case of Viterbo *vs.* Friedlander, which arose in the State of Louisiana, an issue occurred as to whether the French or English text of a law should be accepted. The Court held that the statute must be construed with reference to the object, to the legislation and system of which it forms a part, in order to ascertain its true meaning and intent; and if its purpose and well-ascertained object are inconsistent with the precise words of a part, the latter must yield to the paramount and controlling influence of the will of the legislature resulting from the whole. The court also held in construing those articles of the Civil Code of Louisiana which were originally enacted both in French and in English, the French text may be taken into consideration for the purpose of clearing up obscurities in the English text. (120 U. S., p. 707.)

The facts in the Diaz case were as follows:

Diaz was a man 51 years of age, and was thrown from a street car, due to the carelessness of the motorman in

starting the car with a jerk while the injured party was stepping to the ground. The latter received serious bodily injuries, for which he claimed $5,000 damages. He was not permanently disabled. He claimed $1,000 additional damages for distress of mind or "moral sufferings" caused from his being separated from his family who were left without pecuniary resources at Vega Redonda, some distance from San Juan. The injured man had worked as a farmer and hawked about his products, supporting himself and his family with his labor. The Supreme Court of Porto Rico awarded $2,000 damages to the injured party, and in doing so referred to the principles of American as well as Spanish law to support its ruling.

We are especially concerned here with the decision in the case wherein it states that damages for physical pain may be recovered under Spanish law. To sustain its conclusion on that point the court referred to a decision of the Supreme Court of Spain, rendered on December 14, 1894. The style of the case is not given. We take the following statement of the Spanish Court's decision from the Diaz opinion (*supra*), pages 70 to 72:

> "Eulogio Santa Maria died in Madrid in 1891, in consequence of a fall from the wall of the racket known as 'Jai-Alai,' which he was climbing for the purpose of placing the customary flags to announce the opening of the game. The facts were investigated through criminal proceedings, which were discontinued, and then the widow of the deceased, in her own behalf and on behalf of her infant daughter, Teodora, instituted a civil action in the proper court, alleging that 'the cause of the fatal accident resided in the fault and omission of the owners of the racket, because, as they knew and saw, neither the place for the raising of the flags nor the road that had to be gone over to reach it were in a condition to insure safety; that at his death her husband had left

two children, one named, Anastasio, of 14 years, had by his first marriage, and another named Teodora, of 3 years, had by his second marriage with the plaintiff; that the damages caused and for which the defendants should be held responsible were of a two-fold character—that is, one having reference to affection and the other to the loss of the modest pay which, capitalized at 5 per cent and added to the sum demandable for the first-mentioned consideration, amounted to *21,425 pesetas*. The defendants alleged that the death of the plaintiff's husband could not be ascribed to any fault, omission, or negligence on their part, etc., and prayed that the complaint be dismissed. After hearing the case the court rendered judgment condemning the defendants to pay the sum of *5,000 pesetas to the heirs of the deceased* as indemnification for the latter's death. An appeal from said judgment having been taken by the plaintiff, the defendants joined in said appeal, and the 'Audiencia territorial,' in deciding the case, adjudged the defendants to pay *the plaintiff in her own right and as representative of her daughter, Teodora, 5,000 pesetas*, as indemnification for the death of her husband, affirming, *in these terms*, the judgment appealed from, and reserving to the other child of the deceased, who was not a party in this case, his right likewise to demand indemnification. The defendants then took an appeal for annulment of judgment to the Supreme Court, alleging that various laws had been violated and, among other particulars, that the judgment did not state the amount at which the court valued the life of Santa Maria, nor was anything allowed the plaintiffs on the score of affection or for damages, nor was the principle mentioned upon which the court had acted to fix the sum of *5,000 pesetas*.

"The Supreme Court of Spain affirmed the judgment appealed from in its opinion of De-

cember 14, 1894, the grounds whereof are the following:

'As to the ground the court had for concluding in view of the evidence, that the death of the unfortunate Eulogio Santa Maria was due to the omission on the part of the appellants, owners, and managers of the racket (ball game) known as "Jai-Alai," of such precautions as were called for to forestall the dangers attending the placing and removal of the streamers, which the deceased had been doing with their knowledge and consent, and for their benefit, we find that said court has correctly applied Articles 1093, 1902, and 1903, and that it has not violated Articles 1101, 1103, and 1104 of the Civil Code, because according to the first-mentioned articles, obligations arising from acts or omissions, in which faults or negligence, not punished by law, occur, are subject to the provisions of said Articles 1902 and 1903, and, according to the latter, indemnification for the damage done lies whenever the act or omission has been the cause of the damage and all the diligence of a good father of a family has not been observed, either when the act or omission is personal with the party, or when it has reference to persons for whom he should be responsible; and because the provision of Articles 1101, 1103, and 1104 are of a general character and applicable to all kinds of obligations and do not come in conflict with the special provisions of Articles 1902 and 1903;

'The indemnification corresponding to the damage caused by a guilty act or omission, not constituting a crime, should be declared, as are all indemnifications, in every suit, in accordance with the particular damage caused to the claimants, and as in the judgment this has been done with respect to Juana Alonzo Celada and her daughter, the only plaintiffs, by fixing the sum due them, said judgment does not violate Article 1902 of the code, and much less does it violate Article 360 of the Law of Civil Procedure:

> 'The amount of the indemnification adjudged is based on the evidence taken and on the facts admitted by both parties in their pleadings at the trial, wherefore there has been no violation of Article 1214 through lack of proof, as alleged.'"

The Supreme Court of Spain stated in its finding that "the amount of the indemnity adjudged is based *on the evidence taken and on the facts admitted by both parties in their pleadings at the trial, wherefore there has been no violation of* Article 1214, through lack of proof as alleged." On the other hand there was no evidence taken in the Diaz case respecting the amount of the indemnity. Though the fact does not appear from the statement just quoted from the Diaz case, doubtless the plaintiff's allegation in the Celada case, that she was entitled to compensation for the loss of the modest pay of her deceased husband capitalized at five per cent, was supported by evidence at the trial. In addition to the loss of income, she demanded a further sum *having reference to affection*, and the two elements combined made up the sum of 21,425 pesetas, her total demand.

The court of first instance gave the widow a judgment of 5,000 pesetas—the equivalent of about $950—to the heirs of the deceased. The plaintiff and defendants appealed to the Audiencia territorial, and there a judgment for the sum of 5,000 pesetas was rendered in favor of the widow and her child, reserving to another child of the deceased, who was not a party in the case, his right likewise to demand indemnification.

From this judgment the defendants took the recourse of cassation to the Supreme Court of Spain. The defendant objected to the judgment because it did not state the amount at which the court valued the life of Santa Maria, nor was anything allowed the plaintiffs on the score of affection or for damages, nor was the principle

mentioned upon which the court had acted to fix the sum of 5,000 pesetas.

Viewing the defendant's objections to the judgment of the Audiencia territorial from the standpoint of American practice and procedure, it would seem that the exceptions to the judgment were due to the failure of the court to declare special findings, showing the value of the life of the deceased and the value of his affection which his widow and child had lost by reason of his death. The court simply entered a general finding awarding the widow and child 5,000 pesetas. The widow claimed for herself and her child an economic or pecuniary loss, her husband's income, which ceased upon his death, and she asked that she be indemnified by capitalizing that income at five per cent. The sum of 5,000 pesetas, that is to say, $950, can not be said to be anything more than the *lucro cessans* suffered by the woman and her child as a result of her husband's death. And, to use the language of the Supreme Court of Spain, "the amount of the indemnification adjudged is based on the evidence taken and the facts admitted by both parties in their pleadings at the trial." The conclusion is irresistible that the Spanish court did not set a money value on the life of the plaintiff's decedent except as to her loss of income resulting therefrom, and that the court did not allow anything on the score of affection, because it was not a proper element in estimating damages. We respectfully submit that the decision of the Supreme Court of Spain militates against the ruling of the Supreme Court of Porto Rico in the Diaz case.

The Diaz case makes no reference to the decision of the Supreme Court of Spain of December 6, 1882, in which it was held that "inasmuch as the value of honor is a thing that can not be appraised, it is not possible to fix the amount of damages, nor can the payment of an indemnity be imposed upon the offender under Article

18 of the Code, by way of civil liability arising out of a criminal act." The court announcing that doctrine could hardly have held that damages could be recovered "on the score of affection."

Neither does the Diaz case refer to the decision in the Maimó case, rendered by the Supreme Court of Cuba, already referred to in this brief, wherein it was held that without evidence of an economic loss measured in money there can be no recovery.

It is to be regretted that the decision of the Supreme Court of the Philippines, Clara Marcelo *vs.* El Chino Velasco, elsewhere cited in this brief, was not brought to the attention of the Porto Rican court while it had the Diaz case before it. The two insular courts have the same general system of substantive laws, and each of them is composed of native and American lawyers.

The Supreme Court of the Canal Zone, in rendering the opinion in the Fitzpatrick case, *supra*, cited the decisions of the Supreme Court of Louisiana in support of its conclusion that physical pain was a proper element in computing damages.

It is true that Article 2315 (2294) of the Louisiana Code provides that "every act whatever of man that causes damages to another obliges him by whose fault it happened to repair it," and in that respect the article of the Louisiana Code is similar to that of the Canal Zone law. But that article of the Louisiana Code does not stand alone. Article 1934 (1928) of that code reads as follows:

> "Art. 1934 (1928). *Damages; Measure. 3. Discretionary; assessment of damages in cases of tort, or where there is no exact test.* Although the general rule is that damages are the amount of loss the creditor has sustained, or the gain of which he has been deprived, yet there are cases in which damages may be assessed without

> calculating altogether on the pecuniary loss, or the privation of pecuniary gain to the party. Where the contract has for its object the ratification of some intellectual enjoyment, whether in religion, morality, or taste, or some convenience or other legal gratification, although these are not appreciated in money by the parties, yet damages are due for their breach; a contract for a religious or charitable foundation, a promise of marriage, or an engagement for a work of some of the fine arts, are objects and examples of this rule.
>
> "In the assessment of damages under this rule, as well as in the cases of offenses, quasi offenses (torts), and quasi contracts, much discretion must be left to the judge or jury, while in other cases they have none, but are bound to give such damages under the above rules as will fully indemnify the creditor whenever the contract has been broken by default, negligence, fraud or bad faith of the debtor."

Article 1934 of the Louisiana Code is so materially different from the law of the Canal Zone on the subject of damages, that a reference to the authorities of that State to support the decision in the Fitzpatrick case is not justified.

Counsel for the defendant in error referred to what was said by the Superior Court of Panama in the case of Felipe Ramirez *vs.* Panama Railroad Company as indicating that the Panaman courts were inclined to consider physical and mental suffering in suits for damages. We will quote the passage in that decision, referred to by counsel for the defendant in error. It appears on page 95 of the appendix to this brief.

> "The sum of sixty thousand pesos which Mr. Ramirez claims through his attorney, Mr. Isidoro Burgos, for damages and injuries received, would not compensate, even in a small degree the physical and mental sufferings of the injured

party. His misfortune is lamentable, for though it may not be permanent, as may be deduced from the prognosis of the physician, Dr. Jorge E. Delgado, there are mental sufferings, which though not tangible, yet we can all appreciate, principally when they do not affect us personally."

"This action also involves the family of Ramirez, with their feelings and sufferings—but law is justice and it is necessary to so apply it as to give to each one what the law allows."

It is evident that the Court was speaking in a purely moral sense, and not juridically.

We respectfully submit that in conformity with the laws of the land, with which the people on the Isthmus are familiar, the plaintiff in error is entitled to a reversal of this case upon all of the issues here presented. The rulings of the Canal Zone court, as well as that of the Circuit Court of Appeals, were based, largely, upon common law principles, rather than those of the civil law. The decisions of the Canal Zone court in the cases referred to in this brief clearly indicate that to be so, and an examination of other decisions of the Circuit Court of Appeals, in cases arising from the Canal Zone, manifests an inclination of that court to engraft common law principles upon the Colombian system of laws in force in the Canal Zone.

We respectfully refer the Court to the decision of the Circuit Court of Appeals at New Orleans in the case of Bergen Point Iron Works *vs.* William E. Shaw, decided on March 14, 1918 (249 Fed. Rep., p. 466) wherein the judgment of the District Court of the Canal Zone was reversed because the trial court did not instruct the jury in respect to the doctrine of assumed risks on the part of the servant or employee; and the case of Pacific Mail Steamship Company *vs.* Wilfred Benneby (250 Fed. Rep., p. 444), decided on April 10, 1918, wherein the judgment of the District Court of the Canal Zone

was reversed upon the ground that the plaintiff in that case was injured through the negligence of a fellow servant, and that the trial court erred in not directing a verdict for the defendant upon that point alone.

The fellow servant doctrine, as well as that of assumed risk, in the law of master and servant, belong to the domain of the common law. They have no place in the laws and jurisprudence of Colombia and Panama. We cite these two decisions because they seem to indicate a departure from the rules of civil law which govern in the Canal Zone.

We respectfully submit that the ruling in this case was a departure from the promise held out to the people of the Isthmus by the President in his letter of May 9, 1904, as well as that of October 18, 1904, which letters have already been referred to in this brief, that the laws with which the people on the Isthmus were familiar were to continue in force until amended or repealed by competent authority, and that our government had no intention of establishing an independent colony in the middle of the State of Panama, and that we had no desire to interfere with their systems beyond what might be necessary to accomplish the great work of constructing and operating the Canal. We take it that these two letters of the President come within the terms of Section 2 of the Act of Congress of August 24, 1912, entitled "An Act to provide for the operation, maintenance, and protection of the Panama Canal and the government and sanitation of the Canal Zone, known as the Panama Canal Act," which expressly ratifies as valid and binding all laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the Canal Zone and the construction of the Panama Canal.

We submit that the rulings of the Canal Zone Court, in permitting a recovery against the plaintiff in error

under the facts of this case, and in awarding damages to the defendant in error on account of mental and physical suffering, are against the principles of the local law; and the ruling can not be justified upon the ground that the Canal Zone is now peopled with American citizens. As was said by this Court in the case from Porto Rico:

> "The proposition begs the question, since it puts out of view the express provision of the Act of Congress sanctioning and enforcing the local law, except insofar as Congress had deemed fit to abrogate the same. Considering the manifest intent of Congress, we can not close our eyes to the fact that that body, in providing a government for Porto Rico, evidently intended to preserve to the people of that island the system of local law to which they had been accustomed, nor can we consistently with this enlightened purpose, assent to the conclusion that the mere provision of the act by which a court was created to enforce the local law, empowered the court so created to set at naught the local law, by disregarding fundamental rules of real property governing in the island, thereby creating confusion and uncertainty, and hence tending to the destruction of the rights of innocent third parties. Especially is this conclusion rendered necessary when a consideration, previously adhered to, is again called to mind, that is, that all the local law of Porto Rico is within the legislative control of Congress." (Romeu *vs.* Todd, 206 U. S., pp. 369 and 370.)

THE PREMISES CONSIDERED, we respectfully ask that the decision of the Circuit Court of Appeals, affirming the judgment of the District Court, be reversed, and that this Court render such judgment as should have been rendered by the Court below.

FRANK FEUILLE,
WALTER F. VAN DAME,
Attorneys for the Panama Railroad Company, Plaintiff in Error.

APPENDIX.

FELIPE RAMIREZ, by ISIDORO BURGOS, his attorney, *Plaintiff, vs.* THE PANAMA RAILROAD COMPANY, *Defendant.*

Translation of a Certified Copy of the Decision of the Superior Tribunal of Panama, January 28, 1886, and Translation of the Decision of the Supreme Court of Justice of Colombia, at Bogota, March 31, 1887, published in the "*Gaceta Judicial*," Vol. I, p. 170: Year 1, No. 22, Bogota, June 10, 1887.

SUPERIOR COURT OF JUSTICE.
PANAMA, *January 26th, 1886.*

Submitted: The first Civil Judge of this Province pronounced a condemnatory verdict against the Panama Railroad Company on the 28th day of July of the year last past, in the suit against said company instituted by Mr. Felipe Ramirez through his general attorney, Mr. Isidoro Burgos. From this sentence both parties have appealed, wherefore this Superior Tribunal is about to take up the case in order to pronounce a fitting sentence.

(I) The plaintiff in his complaint expresses himself thus: "I formally demand of the Panama Railroad Company the sum of sixty thousand pesos ($60,000) in which sum my principal, according to the instructions I have received from him, estimates the permanent injuries and damages caused him by being thrown from a coach of the Panama Railroad Company by Mr. C. Smith, the conductor of the said coach."

The complaint was allowed to be filed, notice issued, and proceedings followed their legal course until they

reached a stage where the parties could plead in accordance with what was claimed and proved. This was done and the judge pronounced the sentence on the day named, its resolving part being summarized in the three following paragraphs:

A. That the facts on which is based the present complaint of Felipe Ramirez against the Panama Railroad Company for damages and injuries sustained by reason of being thrown violently from a coach of the said company on the 7th day of February of the present year, by the conductor, C. Smith, are proved.

B. That the right of Felipe Ramirez to demand indemnity of the Panama Railroad Company is proved, and

C. That the said Panama Railroad Company is condemned to pay to Felipe Ramirez the damages legally appraised, with costs at the charge of the said company.

(II) That the demanding part of the written pleading, read at the hearing of the 23d of December last past, is as follows: "I only ask that there be cleared up in the sentence one point which may appear doubtful, and which obliges me to appeal from the sentence in order to avoid new and irritating suits with the Panama Railroad Company. I ask that the sum which this company is condemned to pay to my principal be fixed."

From what is quoted in the foregoing paragraph it is clearly seen that the appeal interposed by the plaintiff limits itself to asking that the sum which the railroad company is condemned to pay to Felipe Ramirez be fixed and that he agrees with the other part of the sentence.

The attorney for the railroad company also appeals in his turn, and makes his appeal cover all of points one to three of the resolving part of the sentence which is to be reviewed.

The record having reached the court for that purpose the attorney for the Panama Railroad Company urged a prior and special plea of nullity on account of the disqualification of the attorney of Felipe Ramirez, and for lack of jurisdiction. The first was based on Article 53 of the *Compilacion* of 1880, that among other public employees, soldiers in active service can not act as attorneys on account of their employment—the attorney for Mr. Felipe Ramirez, Mr. Isidoro Burgos, being reputed as such, who at the time was discharging the functions of Judge Advocate, with the rank of Lieutenant Colonel of the National forces quartered in this place.

And the second cause of nullity was based on the lack of jurisdiction in the civil judge before whom the action was presented, filed, and prosecuted until sentence was pronounced. He who urged this objection, as a basis therefore expressed himself thus: "I have alleged nullity for lack of jurisdiction because the controversy, in my opinion, ought to be tried before a commercial jurisdiction or before the National Tribunals."

The legal course being given to the proceedings the Court thought proper to resolve the point on the 9th of September in the following manner:

> *First Point. Disqualification of the plaintiff's attorney.*—"Doctor Burgos is not, therefore, included in the prohibition of Article 53 of the *Compilacion* of 1880."
>
> *Second Point. Lack of jurisdiction.*—"The proceeding urged by the attorney for the company is declared unfounded."

As this second point, although the matter has been resolved and filed in the archives of the Secretary of this Tribunal, is still a matter of discussion in a certain essential part of the brief which the attorney for the company has submitted for final consideration, it will be well to reproduce in this judgment the principal reasons which influence the court in its decision:

Matters of commerce are those which have their origin in a mercantile operation, and the damages and injuries arising out of a criminal act are outside the scope of any contract whatever.

Because a transportation enterprise resembles a mercantile enterprise it should not be deduced that all of its acts are of a commercial nature. The loss of a member or the life of an individual, losses which can not be estimated, are for that reason beyond exact computation, it being necessary to appraise them with regard to various circumstances. None of these circumstances can have the least relation to commercial affairs, but they are directly submitted to the general substantive laws, which proceeding is indicated by the Judicial Code, and the cognizance of which is within the exclusive jurisdiction of the civil judge.

Crimes are never in any case matters of commerce.

Article 1487 of the Judicial Code says:

Civil actions which directly or indirectly grow out of a crime or fault are instituted separately from the criminal action, before judges qualified in civil affairs, according to the requirements of books 1 and 2 of this code.

Indemnity which commercial enterprises have to pay for damages and injuries arising out of crimes has no place in affairs of commerce.

Indemnity growing out of a crime or fault is not, therefore, a commercial matter. Neither is a passenger against whom a crime is committed a person who pertains to the criminal jurisdiction.

III. The incident being concluded, the proceeding followed its regular course until a stage was reached where the final statements of the parties could be heard, which took place at the hearing of the 23d of December last and the 3d of January of the present year. The debate has been maintained with intense interest by both par-

ties. The points of law submitted to this Superior Court have been examined with such searching pertinacity that, by reason of their unusualness, by reason of their connection with the different jurisdictional branches into which the legislation of the Republic is divided, by reason of the confusion to which this has given rise, they have demanded a long and temperate study, as well on account of the unavoidable duty of "giving to each one his right," and because the proper adjudication of the present interests involved will have a more important bearing in the future.

The sum of sixty thousand pesos which Mr. Ramirez claims through his attorney, Mr. Isidoro Burgos, for damages and injuries received, would not compensate, even in a small degree the physical and mental sufferings of the injured party. His misfortune is lamentable, for, though it may not be permanent, as may be deduced from the prognosis of the physician, Dr. Jorge E. Delgado, there are mental sufferings, which though not tangible, yet we can all appreciate, principally when they do not affect us personally.

This action also involves the family of Ramirez, with their feelings and sufferings—but law is justice and it is necessary to so apply it as to give to each one what the law allows.

This is not, however, the first time that an action to recover damages and injuries has been instituted against chartered common carriers in the Republic. The General Transatlantic Company has been the subject of claims of this kind before the tribunals of the extinct State of Bolivar, if not for damages to the person, yet for those to property. The novelty of the claim urged to-day consists in the meaning and application of the legal provisions which it is sought to make effective.

IV. Hence, it is considered (1st) that the principal points which ought to be embodied in this sentence are:

A. The act on which the claim is based. B. If it gives a right to recover damages and injuries, and, C. To whom the charge is imputable. (2d) That these three points are the same that the judge of the first instance set out, and the same from which the parties respectively appealed. (3d) It is a fact, and is proved that Felipe Ramirez has suffered injuries which, as the physicians, Doctors Quijano Wallis, Manuel Antonio Mora, and Jose Maria Lambana state will render him an invalid for life. (4th) That Dr. Jorge E. Delgado, in his prognosis, does not affirm this but says that owing to the age and ill health of the injured person *it is possible* that he will be permanently crippled. (5th) That the injury was caused by C. Smith, and as the manner in which the act took place has so often been referred to, the Court, recurring to what appears in the record in this respect also affirms that Smith committed the offense of which he is accused, which is a crime included in one of the sections of article 2, chapter 3, title 1, book 3 of the Penal Code.

However, it is not thought that Smith should be declared responsible in these proceedings for the criminal act out of which grew the attempt of the 7th of February against the person of Felipe Ramirez, inasmuch as criminal matters have their own special procedure and jurisdiction, which may not be encroached on with impunity. The estimate here made of the act and the responsibility therefor is purely to establish a starting point from which a conclusion may be drawn as to who is responsible for the damages claimed by Mr. Felipe Ramirez through his attorney, Mr. Isidoro Burgos. (6th) The Act on which the claim is based gives the right to recover damages. See article 74 of the Penal Code, which provides as follows:

> Article 74. In every crime from which there may result damages and injuries against the pub-

lic treasury or against individuals, the authors and abettors should be jointly condemned to make good the resulting damages, without prejudice to holding one to a greater responsibility than another, according to their resources and culpability.

Article 76. Id. next herein quoted, covers the case.

> Article 76. In case of wounds or maltreatment which incapacitate one for work, the offended party will recover from those responsible, according to their resources and culpability, the means of subsistence and cure during the resulting illness, whenever the injured party derives the principal subsistence of himself and his family from his personal labor so interrupted.

(7th) The right of Felipe Ramirez is undoubted, clear, and evident, that in the application of the articles just quoted he be declared by the competent authority having jurisdiction of the subject, duly entitled to compensation for the wrongs and injuries resulting to him from the crime which permanently incapacitated him for work.

V. (8th) As the damages and injuries sought to be made good arise from a crime, it is indispensable to take into account the provisions applicable to a criminal act, whose consequences are injurious, in order to determine the right which is claimed.

Speaking generally article 1486 of the Judicial Code provides that a civil action for the recovery of damages for a crime or fault, which ought to conform to the requirements of book 3, can not be instituted until the criminal prosecution is concluded with a condemnatory sentence, and before a judge competent to try a civil suit. The fact which gives Mr. Ramirez the right to claim damages and injuries has to be first tried and decided by the proper authority (the jury) for a crime is

dealt with which merits the penalty of banishment or imprisonment. In this connection it is necessary to distinguish that damages and injuries arising from crimes committed on the property of another, and damages and injuries caused by crimes against persons are being treated of. In the first case the civil action may be instituted even without waiting for the termination of the criminal trial. In the second case it is absolutely necessary to await the termination of the said criminal trial, in order that the sentence pronounced by the judge of criminal jurisdiction, being condemnatory, and in accord with the verdict of the jury, the damages and injuries may be appraised and reclaimed.

Article 1487 corroborates these statements when it says "The other civil actions which directly or indirectly grow out of a crime or fault will be instituted separately from the criminal, etc." What are these other civil actions? Those in which it is not permitted to proceed officially. (That is to say, those which require a private prosecution.—Translator's note.) Those which arise by reason of the damages mentioned in the second sentence of article 1483 of the Judicial Code with reference to those indicated in articles 514 and 519 of the Penal Code, and finally those recently introduced by Article 137 of the *Compilacion* of 1880, which defines the case, or when a crime or fault is committed against property.

VI. (9th) It makes no difference that the act may be notorious, it makes no difference that public opinion recognizes it, it makes no difference that the influence of notoriety, the influence of opinion is felt in the minds of the authorities, it is none the less necessary to submit to the written law. This provides by the 18th clause of article 17 of the Constitution of the extinct State of Panama, in force on the 7th day of February, 1886, that, trial by jury as established by the law, etc., in criminal

matters, "is an individual right, recognized, and guaranteed to every individual of the human race found in our territory." The law has established that in the case of crimes which merit the penalty of banishment or imprisonment there is no right to recover for the damages or injuries inflicted on the person until the guilty ones are ascertained and adjudged responsible for the crimes by competent authority. Indemnity for damages and injuries is a necessary consequence of the sentence so pronounced. The personal responsibility can not be extended to another of whom the offender does not depend. This doctrine is particularized in article 11 of the Penal Code and must be accepted.

> Article 11. The responsibility which carries with it a penalty is purely personal and can never be extended to those who are not culpable.

According to the article it is indispensable that the declaration of culpability be first made by the authority having jurisdiction of the criminal branch, in order to maintain against the culprit an action for the damages and injuries occasioned, and always under the restrictions indicated in article 17, id., the second part of which reads thus: "For the purposes of restitution and indemnity the provisions of chapter 3 of title 3 shall be applied," etc. Article 76, which we have already copied, is included in this title and chapter. It is also found in articles 79 to 81, inclusive, whose doctrine is thus set out: "All matters relating to indemnity for damages and injuries will be tried in a civil action (article 79) and as it is seen that the right to indemnity for damages and injuries ought to be first recognized and determined by a sentence pronounced in a criminal action, in which the party responsible for the crime has been heard and convicted, which has not yet taken place, it is clear and evident that the claim which has been instituted is untimely."

(10th) Article 80 confirms what has been said in this analysis:

> Article 80. If the convict, or the persons who ought to respond for him, have not sufficient goods to pay the whole of the pecuniary "condemnation" the value of what they have will be applied in the following manner. 1st. To repay the value of the food which has been supplied them. (Referring to the first clause of Article 1046—Administrative.) 2d. To the compensation for damages and injuries to those who have suffered them. 3d. To the payment of fines.

As there are no useless words in the law it is necessary to determine the legal signification of the words "convict" (*reo*) and "condemnation" (*condenacion*) which are there used. "*Reo*" (convict) juridically speaking, in criminal law, refers to him only who is or has been condemned, and it could not be otherwise since it is based on the general principles of legislation.

(11th) If one examines book 3 of said code, which treats of the institution and prosecution of criminal trials (criminal procedure) it will be seen that the following gradation, with reference to those responsible for criminal acts, is preserved from the first to the last of its articles: At the preliminary hearing—"accused of crime," "suspected," "held for trial," or other words whose meaning does not encroach on any other phase of the trial. On trial—"presumptive criminal," "indicted," or others of that style until sentence is pronounced. Once sentence is pronounced the prisoner is termed a "convict" (*reo*), and to give more force to the words he is called a sentenced defendant or confirmed criminal.

As is seen the phrase which is used in the article under examination, "to pay the whole of the pecuniary condemnation" could not refer to anything except the goods of one who has been condemned (*condenado*) in the

criminal action; to the goods of the persons who ought to respond for others, in order to pay with their own goods what may be lacking of the goods of the former, so as to make up the total of the pecuniary condemnation.

(12th) The doctrine treated of is confirmed by article 81 which reads thus:

> The pecuniary responsibility growing out of criminal acts executed by minor children, pupils, servants, and in short, by persons who depend upon others, will be made effective out of the private goods of such persons, without the persons from whom they depend being held to a greater responsibility than the civil and subsidiary one in the respective cases and in conformity with law.

Supposing that one of those persons depending on others be condemned in conformity with the law, the pecuniary condemnation must be paid from the goods which he may have, in the order specified in article 80; and if they should fall short of the value of the whole condemnation, then, subsidiarily, that is to say secondarily, in order to make good the deficiency in whole or in part, it will be paid out of the goods of the persons on whom they depend; so that if the goods of the pupil, the minor child, or the servant who has been condemned, etc., suffice only to pay what is specified in the first clause of article 80, then the value of the remainder, specified in the other two clauses will be paid from the goods of those on whom they depend. It is thus demonstrated that it is necessary above everything, that in cases such as the present the condemnatory verdict in the criminal action must first be pronounced, in order that indemnity for damages and injuries may be demanded and made effective out of the goods of the persons on whom depend those who being such dependents of others may be condemned to reparation, etc., and hav-

ing analyzed up to this point the first two points of the sentence appealed from, we now proceed to take up the final and fundamental objective of the question.

VII. To whom is the charge imputable? (13th) It appears that C. Smith, an employee of the Panama Railroad Company, was employed by the said company on the 7th day of February, 1886, to casually lend services as conductor of the train. Before going further it should be established, although it appears to involve a contradiction, that the Panama Railroad is and ought to be considered a chartered public common carrier and as such its obligations are contained in the three chapters of title 5, book 2 of the Code of Commerce. For this reason, and the counsel engaged in the suit having handled the question in the field of commercial jurisprudence, the Court, following the course of the debate, proceeds to quote the provisions of that jurisprudence pertinent to clear up the debated point.

Article 258 of the Code of Commerce defines transportation in this manner:

> Article 258. Transportation is a contract by virtue of which one obliges himself, for a *certain price*, to transport from one place to another, by land, canals, lakes or navigable rivers, *passengers*, or the merchandise of others, and to deliver the same to the person to whom they may be consigned.

Article 262 determines the persons who may celebrate this contract:

> Article 262. Persons who have the capacity to obligate themselves may celebrate this contract.

Article 263 sets out the manner in which the transportation contract may be perfected:

> Article 263. The transportation contract is perfected by the consent alone, express or implied, of the parties.

(14) It is necessary to take into account other provisions of the same title in order to make clear who is responsible for the damages and injuries claimed by the attorney for Felipe Ramirez. Articles 319, 320, and 321, will contribute to this end.

> Article 319. The contract for transportation is understood to determine the conditions of price, time of transit and days of arrival, etc.
>
> Article 320. The tickets for seats or compartments establish the contract *when* they refer to the transportation of persons, etc.
>
> Article 321. The conductors of vehicles or stables, station agents, and the masters of vessels, *may receive passengers* and freight during the journey and obligate the empresarios to comply with the obligations thus imposed on the carrier.

(15) From these legal provisions, which have been established as premises, it is deduced: That the obligations of transportation enterprises emanate from a bilateral contract; that the contract may be celebrated by persons having the legal capacity to obligate themselves; that the contract is perfected by the consent alone, express or implied, of the parties; that the tickets for seats establish the contract when they refer to persons, and that the conductors of vehicles, etc., may celebrate these contracts during the journey.

If therefore all this is true, Conductor C. Smith on the 7th day of February was one of the persons reputed by the law to have the capacity to obligate himself, a person *sui juris*, a person responsible for his actions; a legal person.

VIII. (16th) For the completion of this demonstration we complement it with the fourth clause of article 322 of the Code of Commerce. The article reads thus:

> The empresarios (of transportation) are obliged * * * (4th) to indemnify *passengers* for the damages they may suffer in their persons

through defect of the vehicles; through their fault; through that of the conductors or postillions.

We will complete this demonstration by separating the sentence, as has been suggested in the debate, into the periods which its construction permits. 1st. To indemnify *passengers* for the damages which they may suffer in their persons by reason of the *defects of the vehicle.* 2d. To indemnify *passengers* for the damages which they may suffer in their persons through *their* (the empresarios) *fault.* 3d. To indemnify passengers for the damages they may suffer in their persons *through the fault of the conductors.* 4th. To indemnify *passengers* for the damages which they may suffer through the fault of the *postillions.*

Applying strictly and legally the meaning of the sentences contained in the clause thus divided, we reach the following conclusion: That Ramirez, at the time of the affair with C. Smith could not be considered a passenger. He did not prove that he was such by producing a ticket for a seat or compartment. He could not even prove that he was an employee of the Canal Company with the right to travel on the trains of the Panama Railroad Company. And this being so, and considering Ramirez' insistence Smith might well believe that Ramirez meant to travel without paying his fare, a circumstance which did not invest Ramirez with the character of a passenger nor give him the right to recover under the contract of transportation. The injury to Ramirez of February the 7th, not having occurred through a defect of the vehicles, the empresarios can not be responsible to him by virtue of that part of the law above analyzed. Neither can they be responsible by reason of any fault on their part. The unforeseen and unpremeditated occurrence which took place between Conductor C. Smith and Felipe Ramirez can not give rise to the charge of gross fault,

ordinary fault, or slight fault (*culpa lata, leve o levisima*) against the transportation empresarios. A quarrel, a provocation on the part of a recognized passenger, or any other accidental happening of the moment, growing out of the attack or defense of the train conductor, and the resulting injury or crime, can not be equitably imputed to the fault of the empresarios, for the law does not extend the responsibility for such acts, of themselves personal, to those who are not culpable. See Article 11 of the Penal Code.

> The responsibility which carries with it the imposition of a penalty is purely personal, and is never extended to those who are not culpable.

"Through the fault of the conductors or postillions," the fault which may be attributed shall not be, and ought not to be other than that which results from the defective discharge of their duties, such, for example, as starting before the appointed hour, and at the time when a passenger is about to take the train or car and thereby suffers an injury; the damage inflicted on the persons of passengers by an accident caused by the mishandling of the machinery or carelessness in its use. The occurrence treated of not falling under any of these heads it is deduced that the doctrine of clause No. 4 of article 322 of the Code of Commerce, already analyzed, does not apply to it.

IX. (18th) We now proceed to examine the question in the light of the provisions of the Civil Code and to make clear the doctrine of articles 1547 to 1549 of said code.

> 1547. In order that a person may be obliged to another by an act or declaration of intent, it is necessary first that he be legally capable of obligating himself. The legal capacity of a person consists in his ability to obligate himself by his own act and without the agency or authorization of another.

> 1548. Every person is capable of obligating himself except those whom the law declares incapable.
>
> 1549. Insane persons and those who have not reached the age of puberty are absolutely incapable. Minors who have not attained full legal age, and spendthrifts are also incapable. Besides these there are other special disabilities arising out of the prohibitions which the law imposes respecting certain persons to execute certain acts.

The persons to whom this part of the quoted article refers are those who ought to be under the charge of others, such as minor children who live in the same house with the father or mother; the pupil who lives under the care and guardianship of his tutor or curator, and all those included under the two final paragraphs of the code under consideration. This provision is both wise and clear, its reason being understood:

> Thus the heads of colleges and schools respond for the acts of their scholars while the latter are under their care, and artisans and empresarios respond for the acts of their apprentices and dependents in like case.

Students, as a rule, are under legal age and on arriving at their colleges or schools, under the law and the school or college regulations they remain under the care of the chiefs of such schools or colleges. The apprentices and dependents of artisans and empresarios render these responsible in like case; that is to say, where they are subordinates by reason of the service which they render in a factory, office, or store, where they are under the care and control of the chief of the enterprise.

The doctrine of this article, which is endeavored to be applied to the case of C. Smith, considering him as a dependent of the Panama Railroad Company, and the atter as consequently responsible for his acts, is not ap-

plicable to the case, for if it is true that Smith was an employee of the company it can not for that reason be said that he was one of those persons dependent on another or under the care of another, according to the classes enumerated in the foregoing provisions.

X. (19th) That Smith was capable of obligating himself legally is proved by the fact that he was of full age. The same is proved by his character of conductor of the train of the said 7th day of February, 1886, for, as has been seen, these functions can not be exercised except by those capable of obligating themselves to others. Neither was Smith on the said day an insane person nor a pupil under the guardianship of a tutor or curator. He was an employee of the company but not its dependent. These words "employee" (*empleado*) and dependent" (*dependiente*) are usually treated as synonymous; but the law and jurisprudence differentiate them. Between "*empleado*" and "*dependiente*" there is a great and very palpable difference; the "dependent" of a person, he who is under his guardianship or care, may be employed in the service of that same person; but the "employee" of a person or enterprise can not be his or its dependent. The dependent of one person, under the law, may be the employee of another on whom he does not depend, and in so rendering his services he is not converted into an unemancipated son, nor does he come under the guardianship of his patron or empresario. An employee of the legal status of C. Smith does not bind himself to live under the same roof as his chiefs. The law reputes workmen of this class to be legal persons. A legal person is one in whom the law recognizes the capacity to obligate himself. Not so as to persons dependent on others; those who can not obligate themselves without the assistance of others on whom they depend.

XI. (20th) Now then, and going back a little to those considerations in order to apply the doctrine of article 320 of the Code of Commerce, the Panama Railroad Company can not be held responsible for the act of train conductor C. Smith, and this is explained thus: If the tickets for seats or compartments establish the contract of transportation, when the transportation of persons is referred to, and Ramirez could not prove his right to travel as a passenger in the coaches of the enterprise; and if Ramirez could not prove his right by a ticket for a compartment, as an employee of the Interoceanic Canal Company, it is clear that between C. Smith and Felipe Ramirez, the first the train conductor of the company, the chartered common carrier, that is, the Panama Railroad Company, and the second, Ramirez the contract for transportation had not been perfected, and consequently no obligations had been contracted between the former and the latter. If then there existed no contract between Smith and Ramirez, still less could an obligation have been contracted with a third party by reason of an act not connected with his functions as train conductor, etc.

From what has been set out it is deduced that the criminal act committed by C. Smith is purely a personal one, and C. Smith is responsible for it.

Considering all these things the Court, administering justice in the name of the Republic and by authority of the law, revokes the sentence appealed from and declares the Panama Railroad Company absolved from the charge brought against it by Mr. Felipe Ramirez, through his attorney Mr. Isidoro Burgos, demanding sixty thousand pesos for damages and injuries growing out of the criminal act committed by C. Smith on the person of the plaintiff on the 7th of February, 1886.

Let the resolving part of this sentence be read in public session. Let the parties be notified to attend in the

office of the Secretary, to that end, let it be recorded and returned.

AGUSTIN JOVANE—ENRIQUE LOPEZ ZAPATA—Citizen Magistrate PRESIDENT—

The Citizen Magistrate of the third plaza has declined to sign the foregoing sentence, giving as a reason that in accordance with law 61 of the past year it was an attribute of the Supreme Court of the Republic to pronounce sentence in this matter. Panama, January 31, 1887.

JOSE B. VILLAREAL, *Secretary*.

PRESIDENCY OF THE SUPERIOR COURT OF JUSTICE,
PANAMA, *January 31, 1887*.

Let the Citizen Magistrate of the third plaza be served, in order that he may be immediately notified of this decision, sign the aforesaid sentence, and in case of disobedience be fined twenty pesos, which will be made effective in conformity with article 6 of the *Compilacion* of 1880. Let notice issue.

JOVANE—VILLAREAL, *Secretary*.

I notified the Citizen Magistrate of the third plaza, Mr. Jose Ma. Rodriguez.

RODRIGUEZ.—VILLAREAL, *Secretary*.

The new tribunal being installed I file this matter in the office of His Excellency the Magistrate President, this the 3d day of February, 1887.

JOSE B. VILLAREAL, *Secretary*.

SUPERIOR TRIBUNAL OF THE JUDICIAL DISTRICT.
PANAMA, *February 5th, 1887*.

It pertains to the Supreme Court to take cognizance in the final instance of those actions in which foreigners take part, in conformity with clause 5 of section 2, article 21 of law 61 of 1886, and as the present trial was

pending in the final instance before the extinguished Superior Court of the Department it is ordered: After citation of the parties, and at the cost of those who interposed the appeal let the decree be remitted to the Supreme Court in order to be made effective.

AGUSTIN JOVANE.—ENRIQUE LOPEZ ZAPATA.—B. PORRAS.—M. J. DIEZ.—JOSE MARIA VIVES PICON.—JOSE VILLAREAL, *Secretary.*

I notified Mr. Antonio Ramirez E.

RAMIREZ E.—VILLAREAL, *Secretary.*

I notified Dr. Pablo Arosemena.

AROSEMENA.—VILLAREAL, *Secretary.*

Interlined "los" "V" "de esta manera" "Articulo 258." "El transporte es en." Valid.

A copy. Panama, August 2, 1912.

(Signed) EDWIN CHANDECK, *Secretary.*

An impression of a stamp reading: "Republic of Panama, Province of Panama. Second Circuit Court Judicial Power."

Translation from the "*Gace a Judicial*," Vol. I, p. 170: Year 1, No. 22, Bogota, June 10, 1887.

SUPREME COURT OF JUSTICE,
BOGOTA, *March 31, 1887.*

Submitted: Isidoro Burgos, as attorney of Felipe Ramirez, instituted before the Civil Judge of the Department of Panama, in the extinct State of the same name, an ordinary suit against the Panama Railroad Company for damages and injuries inflicted on the person and interest of the plaintiff, as was alleged, by one of the employees of the enterprise.

The action followed the usual legal course and sentence was pronounced in both instances, and before

notice was given of the sentence pronounced by the Superior Tribunal of that section, that body considered that the cognizance of the matter in the second instance pertained to the Supreme Court of Justice, and for that reason they have sent the record of the proceedings to this appellate court.

Section 9 of law 46 of the present year repealed paragraph 5, section 2 of article 21 of law 61 of 1886; and in consequence the superior tribunals of the districts are the ones that ought to review the sentences of the first instances pronounced by the judges of the circuit, in which the rights and obligations of foreigners are treated of.

Wherefore the Supreme Court of Justice, in accord with the Procurador, abstains from entering a judgment in this matter and orders that the process be returned to the tribunal transmitting it.

Let notice issue; let it be copied and published.

(Signed) R. ANTONIO MARTINEZ.—JOSE N. SAMPLER. JULIAN R. COCK BAYER.—FRANCISCO A. FERNANDEZ.—BENJAMIN NORUEGA.—MANUAL A. SANCLETO.—RAMON GUERRA A., *Secretary*.

On April 1, 1887, I notified the Procurador General of the foregoing decree.

ARRANGO M.—GUERRS, *Secretary*.

On the 2d of April, 1887, I notified Mr. Julian Felix de Leon of the foregoing decree.

DE LEON.—GUERRA A., *Secretary*.

(Translation from the "Judicial Gazette," Vol. VII, No. 353, pages 332–334.)

RUPERTO RESTREPO *vs.* THE SABANA RAILWAY COMPANY (*La Compañia del Ferrocarril de la Sabana*).

SUPREME COURT OF JUSTICE,
BOGOTA, *July 19, 1892.*

Decree: On the 3d day of February, 1890, Ruperto Restrepo filed a complaint in an ordinary suit against the Sabana Railway Company, so that, after hearing the company and its Manager, and after due trial, the company might be condemned to pay to the plaintiff the damages which he alleges he has suffered by reason of the passage of trains through the hacienda "*La Jabonera*", and by reason of the occupation of a zone of land which the company took on which to construct the railway without the consent of Francisco Soto Villamizar, the owner of the hacienda which the plaintiff occupies in his character of lessee.

He estimated the amount of damages at two thousand one hundred pesos (P 2,100) and bases his demand on the following allegations:

"(1) I am the lessee of the hacienda "*La Jabonera*," the property of Mr. Francisco Soto V. and now belonging to his heirs, since the year 1886.

"(2) The railway crosses said hacienda and the tracks occupy an extent of more than 900 meters in length.

"(3) Without the consent of the owner of the hacienda, and without legal expropriation, the Sabana Railway Company took possession of the necessary strip and constructed its tracks.

"(4) This occupation deprives me of the enjoyment of a part of the land held under lease, of an area of three fanegadas more or less, and I estimate the damage at two hundred pesos (P 200).

"(5) The trains in passing through the hacienda have killed or rendered useless the animals whose values I set out below:

"One heifer, killed, whose value was one hundred and twenty pesos ($120).

"Two cows, crippled and rendered useless, whose loss in value was one hundred pesos (P 100).

"Three calves, crippled. Loss in value one hundred and eighty pesos (P 180).

"One thoroughbred bull, damaged and rendered useless for breeding purposes. Loss in value one thousand five hundred pesos (P 1,500)."

The plaintiff adds that the right, cause, or reason of his complaint is that conferred on him by the provisions of chapter 9, title 3, book 4 of the Penal Code and articles 2341 *et seq.* of the Civil Code.

The complaint being allowed to be filed by the First Judge of the Circuit of Bogota, before whom it was presented, that official, the interest which the nation and the Department of Cundinamarca had in the suit being established, ordered the record sent to the Tribunal of this judicial district, which took cognizance thereof, the first instance taking place there by reason of the parties not having reached an agreement in the amicable conference.

After the denial of a motion made by the plaintiff's attorney, that judgment be taken by default against the Manager of the railway company, for not having answered the complaint, the attorney for the said Manager interposed dilatory pleas or demurrers—to the jurisdiction, defect in the party plaintiff, and that of the pendency of another suit—which were declared not proven by the Tribunal, which decision was confirmed by the court.

Before an answer to the complaint was filed the complaint was amended by adding to the damages demanded the sum of seven hundred and eighty-four pesos, fifty centavos (P 784.50), as the value of three head of

cattle killed by the trains of the same railway after the filing of the original complaint and as the value of an account paid to C. L. de Vericel for the cure of one brindle calf (*ternero sardo*), which seems to be the same that was spoken of in the said complaint, and the damage to which was estimated at fifteen hundred pesos (P 1,500).

The additional charge is made up thus:

Value of one heifer, of crossbreed	$300.00
Value of one cow, of crossbreed	300.00
Value of one small bull, crossbreed	120.00
Value of account paid to Vericel	64.50
Total	$784.50

The complaint so amended was served on the Manager and the *Fiscal* of the Tribunal, who replied to it, denying the right claimed by the plaintiff to demand damages, and offering peremptory exceptions of premature complaint or complaint not in due form, *force majeure*, and fortuitous event, which were allowed to be filed.

The case went to trial on the facts, and, the legal formalities being complied with, the instance was concluded by the sentence of August 28th of the year last past, whose final and resolving part is as follows:

> By virtue of what has been established, the Tribunal administering justice in the name of the Republic and by authority of law, resolves: (1) The Sabana Railway is hereby acquitted of the charge made in the complaint relative to the payment of damages growing out of the occupation of the zone of land in the hacienda "*La Jabonera*" without the consent of the owner; (2) The said Railway Company is hereby sentenced to pay to the plaintiff Ruperto Restrepo the sum which in a separate trial the experts may assess as the value of the damages and injuries which he has suffered by reason of the killing and injuring of certain live stock owned by him; (3) The plea of premature complaint or complaint not in due

form is hereby declared proven in part; (4) The same exception of premature complaint or complaint not in due form is hereby declared not proven in part; (5) the exception of *force majeure*, or fortuitous event is declared not proven; (6) No judgment as to costs is rendered.

Let notice issue and let this sentence be published, copied, and certified to the Supreme Court for its opinion should no appeal be taken.

At the time of notification of the sentence an appeal was interposed by the *Fiscal* of the Tribunal as well as by the attorney for the company and the attorney for the plaintiff, and the appeal being granted the record of proceedings was sent to this court, where at the request of the last named, the case was opened for proof, and the proofs solicited by him were produced. The allegations of the parties being heard and the parties cited for sentence, the Court proceeds to pronounce the corresponding sentence, and in furtherance of which it is necessary to make certain statements.

Naturally the question of the jurisdiction of the court was not examined into since the *Procurador* had pronounced on behalf of the Court an opinion favorable to its juridsiction, because the Court had already resolved the point in favor of its competency when it confirmed the resolution of the Tribunal which declared not proven the dilatory plea of want of jurisdiction.

The defendant company having been acquitted of the charge of damages and injuries arising out of the occupation of the zone of land in the hacienda "*La Jabonera*" on which its tracks are laid, the plaintiff far from demonstrating in the second instance that he had any right to bring this charge, and far from proving that the damages amounted to two hundred pesos (P 200) as alleged in the complaint, said nothing more whatever in regard to it, as may be seen in his last allegation—nor in the expert estimates rendered before this court was

any consideration given by the experts to determine its value. This is proof that the reasons assigned by the Tribunal as the basis of the said acquittal are unanswerable, and that the plaintiff himself so considered them. And as a matter of fact the charge referred to being based on the fact that the railway company occupied the said zone without the consent of the owner, this act, as the Tribunal points out, would have constituted an offense according to the provisions of articles 693 and 694 of the Penal Code in effect at the time the occupation took place; but as the responsibility for this *delito* attaches to a juridical entity (*entidad juridica*) which can not be considered criminally responsible, because we can not suppose in such entities a voluntary and malicious violation of the law by which any penalty may be incurred, a violation and malice which could not exist in an artificial person (*ser ficticio*), it is clear that if such responsibility exists it can only be exacted of the representative of such entity; so that in exacting the responsibility, as has been done, of the entity itself, the fundamental principle of criminal law which demands that the delinquent and the person condemned be identical, has been violated. "Furthermore" says the Tribunal, "granting that juridical persons were capable of committing punishable acts and that the Sabana Railway Company might have been punished in the case with which we are occupied, even so the action instituted would not have been properly brought, for article 1501 of the Judicial Code prescribes that if the civil actions and the criminal action are not brought at the same time the civil action can not be prosecuted until the conclusion of the criminal action with the condemnation of the delinquent.

In addition, neither the plaintiff nor his attorney has proved the plaintiff to be a lessee, in which character he instituted the action, and above all they have com-

pletely failed to prove that the value of the damages which constitute this claim amount to the sum of two hundred pesos (P 200) as set out in the complaint.

In regard to the damages caused by the killing and injuring of certain animals by the trains of the railroad the Tribunal considered the company responsible, taking into account that these damages might have existed independently of the *delito* attributed to the company by reason of its occupation of the zone of land without the consent of the owner, since it is evident that though the road was constructed in a legal manner, such damages could have occurred and have occurred, due to the fact that the right of way was not properly fenced off, and that responsibility has been recognized by the Manager of the company, Carlos Tanco, because according to what he has stated on page 17, he was accustomed to make settlements with private persons for the damages caused them by the trains, which settlements were submitted to the Board of Directors for its approval. The Court would have nothing on which to base a contrary opinion, for it rejects the doctrine, as the Tribunal rejected it, that the damages referred to were the work of *force majeure* or fortuitous cause, which the attorney for the company plead as a peremptory exception. The fact that in some cases it is practically impossible to avoid running over animals found on the railway, because it is not possible to stop the train at a given moment, ought not be considered a sufficient reason for declaring the obligation extinguished, for it is certainly possible to avoid such occurrences by segregating the line by means of suitable fences, as the same company has already done on a great part of its line.

However, as has been seen, the sentence of the Tribunal although it declares the responsibility of the company in relation to the damages suffered by the plaintiff by reason of the killing and crippling of some of his animals

could not determine the sum to which such damages amounted, for lack of the necessary legal proof, principally the expert estimate indispensable in these cases. Consequently it was natural that the attorney for the plaintiff should attempt to better the proofs in the second instance, in the sense of fixing the number of animals killed and the number injured or rendered useless, since the assessment of the experts should be limited to the value of the first and the depreciation of the last, by means of the personal knowledge which they might have had of such animals. Nevertheless, no proof was produced in that regard, and not even the ratification of the witnesses Leon Escobedo and Abdon Pineda was secured, whose testimony would have served to prove the value of the damages to the brindle calf spoken of in the complaint, and which testimony the Tribunal rejected on account of the lack of legal ratification of their statements. The other proofs of the first instance were reduced to the declarations of Campo Elias Torre, Carlos Tanco, Ricardo Morales, and Simon de la Torre, which appear on pages 16 to 19 of the record. The first of these witnesses only states that the trains ran over two animals, a cow and a heifer or yearling bull, in passing through "*La Jabonera*," and he knows that they were crippled, but that he can make no statement as to the value of those cattle because it could not be established.

The witness Carlos Tanco says that "he knows that certain animals were crippled by the trains, in the pastures of "*La Jabonera*," that in his opinion the herd of Mr. Restrepo is of very good grade, but he does not know nor can he state the number of animals which were killed or injured."

The witness Ricardo Morales asserts: "That it is true and a fact within his knowledge that the brindle calf owned by Restrepo was rendered useless by the

trains, and also that the cattle owned by Restrepo were killed; "and further down he states that the same trains have killed ten or twelve cattle belonging to Restrepo and that he knows this because he saw part of the cattle which were killed, and by information received from Mr. Restrepo.

The witness Simon de la Torre also says the "He knew the brindle calf; that he did not know all of the cattle belonging to the said gentleman, which were rendered useless, but he remembers having seen two cows rendered completely useless"—adding afterward that he knows, because he saw it, that the trains killed the two cows to which he referred, and that he knows by hearsay that a greater number of cows were killed or rendered useless.

As is seen, only the last of these witnesses alleges having witnessed the fact that the trains killed two cows. The witness Morales only says that he knows that the trains killed ten or twelve cattle and that he saw some of those animals which were killed, which proves that he did not see how they were killed. The statement of this witness is in contradiction to that made by the plaintiff, since as has been seen, in the original complaint a charge was made only for one heifer which was valued at one hundred and twenty pesos (P 120), and in the amended complaint for three more cattle, which are specified thus: One crossbred heifer, one cow, and one small bull. From which it is deduced that if the statement of the plaintiff is true, that of the witness Morales, who speaks of ten or twelve cattle killed, can not be accepted.

It is then clear from every point of view, as the Tribunal observes, that the full and necessary proof of the number of cattle killed by the trains of the railroad was not produced in the first instance, and as, in the second instance no additional proof of this fact was adduced, it

is clear that the Court can not fix any sum whatsoever as the value of the animals killed. The first expert estimate made by Isidoro Gaitan and Agustin A. Jimenez was rejected by the Court because it attempted to fix the value of animals in general through the knowledge which the experts had of those values, when what was needed was to estimate the value of the cattle killed by the trains, and the depreciation by crippling or damaging the others. It was useless to know that these experts estimated a young thoroughbred bull at one thousand pesos, a thoroughbred cow at eleven hundred pesos, a crossbred cow at one hundred and fifty pesos, an ox at one hundred and fifty pesos, a crossbred bull calf at one hundred and twenty pesos, and a donkey at forty pesos; consequently by the order of the twentieth of February last it was decreed that the experts should fix the value of each one of the cattle killed by reason of being struck by the railroad train and the depreciation or amount of damages suffered by the others from the same cause.

The expert Gaitan in his second report states: "That in Serrezuela he was shown by Mr. Ruperto Restrepo a young brindle bull, which he stated to be the same thoroughbred mentioned in the complaint, and which had been struck by a locomotive, and he found that by reason of a blow which he had suffered during his growing age he had not been able to reach complete development in a manner corresponding to his breed and quality and for that reason he (the expert) estimated the damage to the bull at five hundred pesos." And the expert adds; "As the other animals injured by the locomotive no longer exist, according to the statement of Mr. Restrepo, and as no other was shown to me for its respective valuation, and as those killed of which I have no knowledge, have already been valued in my first report, according to their class, taking into account their alleged

breed and quality, I judge that I have complied with my duty, which I hope may accomplish the desired end."

The expert Jimenez, after saying that he went to the hacienda managed by Mr. Restrepo in order to see the animals injured or wounded, in order to comply with what had been ordered, adds: "Mr. Restrepo informed me that all of the animals injured or wounded by the railroad train, with the exception of a young thoroughbred bull which he showed me, had died from the cause stated, for which reason I can not assign to such animals any other value than that which I gave them in my previous report, with reference to their class. In regard to the depreciation of the young bull mentioned I also estimate that at five hundred pesos."

According to the second report there was no estimate of the animals killed, nor could there have been since the experts were not familiar with them; from which it is deduced that neither can the Court formulate any charge against the railroad company for a value not ascertainable.

In regard to the damage or depreciation of the young bull shown to the experts by the plaintiff, it is true that it has been uniformly estimated at five hundred pesos; but the Court must again observe that no proof has been produced that the damage was caused by a train or locomotive of the railroad company since the witnesses Leon Escobedo and Abdon Pineda who affirmed the fact on rendering their declarations before the municipal judge of Madrid, and the ratification of which was solicited before the Tribunal, which ratification had no legal value on account of not being made in accordance with the requirements of article 638 of the Judicial Code, as was pointed out by the Tribunal itself, and they can not be considered by the Court on account of the lack of confirmation of the said ratification. There exists, then, no legal proof that the damage resulting from the

depreciation of the bull, estimated at five hundred pesos, was caused by the trains or locomotives of the railroad, and in this case the Court can not declare that the defendant company is responsible for the damages or its value.

It is true that the payment to Vericel of sixty-four pesos and fifty centavos for the cure of one brindle calf appears to be proved, but as the deponent himself says, on acknowledging his signature and the facts of the payment, he did not see the accident and can not affirm that the trains of the Sabana Railway injured the calf, and if anything is known to him concerning the matter it is through having heard it from interested parties themselves.

From what has been set forth it is easily deduced that the recourse of appeal having been interposed on the part of the plaintiff against the judgment of the first instance, which condemned the defendant company to pay a sum which should be fixed in a separate trial as the value of the damages and injuries growing out of the killing and crippling of certain cattle belonging to the said plaintiff, the latter proposed on interposing the said recourse, as his attorney stated, to fix the value in the second instance, and thus avoid the separate trial with the same object, which should have followed. But there having been produced no legal proof which the Court could use as a basis for condemning the company to pay a certain sum, it is evident that the verdict appealed from could not be amended in the sense of fixing the indicated value; still less could the Court deny the justice of the verdict in so far as it condemned the company to pay the damages which might be ascertained in a legal manner in a separate trial, for it could not ignore the existence of those damages in respect to the killing and injuring of certain of the plaintiff's animals, though up to now it has not been

possible to satisfactorily assess the amount of said damages, and the Court does not believe as the *Procurador* believes that the defendant company ought to be acquitted of all the charges in the complaint, inasmuch as the institution of a new suit has become unnecessary, granting that in this instance it has not been possible to establish that amount on account of the insufficiency of the proofs. The Court believes on the contrary that the right of the plaintiff to indemnity being recognized, he can not be deprived of that right which he has in conformity with article 840 of the Judicial Code of having the value of that indemnity fixed and determined in separate trial, which can not be considered carried out simply by a substantiation of this second instance.

Therefore, the Supreme Court, partly in accord with the opinion of the *Procurador*, administering justice in the name of the Republic and by authority of the law, confirms the sentence appealed from.

Let notice issue, let it be copied, published in the Judicial Gazette, and let the record be returned.

(Signed) LUCIO A. POMBO.—LOUIS M. ISAZA.—JESUS CASAS ROJAS.—MANUEL EZEQUIEL CORRALES.—MARIANO DE JESUS MEDINA.—EMILIO RUIZ BARRETO.—JUAN EVANGELISTA TRUJILLO.—GABRIEL ROSAS, *Secretario*.

CECILIA JARAMILLO DE CANCINO *vs.* THE RAILROAD OF THE NORTH.

CASSATION.

SUPREME COURT OF JUSTICE,
BOGOTA, *December 16, 1897.*

(Translation: Republic of Colombia, "*Judicial Gazette.*" Official Organ of the Supreme Court of Justice, Year XIII; Bogota, August 16, 1899, Nos. 652–653.)

CIVIL BUSINESS—CASSATION.

SUPREME COURT OF JUSTICE,
BOGOTA, *December 16, 1897.*

Decree: In a memorial assigned to the Fourth Judge of the Circuit of Bogota, on the 4th of June, 1895, Cecelia Jaramillo de Cancino, a widow and a resident of this same city, made the following statement:

> I petition that by final judgment pronounced in an ordinary action you condemn Juan Manuel Davila, who is the concessionaire of the enterprise of the Railroad of the North, to pay me for the damages which resulted from the destruction of a house owned by me, and the articles therein contained, which was situated in the municipality of Suba, and was set on fire by sparks which were thrown out by one of the locomotives of the said railroad company.
>
> Mr. Davila is of legal age and a resident like myself of Bogota. The legal foundations of my suit are the pertinent provisions of title 34 of book 4 of the Civil Code, those of law 62 of 1887, and the most general principles of natural equity.
>
> And to institute this action I depend upon the following facts, which are the reason or cause of it:
>
> 1. During the conjugal partnership which existed between the deceased Mr. Manuel Can-

cino R. and myself, I bought by means of Document No. 413, of the 5th of August, 1891, executed in the first notorial office of Bogota, a piece of land, situated in the municipality of Usaquen according to what the deed states, but which was in reality in that of Suba, on which a house had been built, and which was bounded thus: On the east by the road which leads to the bridge of Comun; on the south by the lands of Zoilo Barrangan; on the west by the land of the same Barrangan, and on the north by the *quebrada* called Batan.

2. In this house there were many valuable articles, among them, parlor and bedroom furniture, wearing apparel, bed clothing, books, tables, and cooking utensils, and many other things, all of which will be determined and valued in the course of the suit.

3. The house was set on fire on the 16th day of June, 1893, and it and all the articles therein contained were completely destroyed.

4. The fire was produced by sparks which one of the locomotives of the Railroad of the North threw out.

5. The house and articles destroyed were worth more than three thousand pesos.

6. The defendant, Davila, is the owner of the enterprise of the Railroad of the North, of which he is concessionaire.

7. Mr. Davila or his agents did not provide adequate measures to prevent the fire; on the contrary the fire was caused by their negligence or want of care.

8. The defendant has not indemnified me for the damages which the fire caused me.

9. The house burnt was near the public road, and through this the line of the Railroad of the North passes; and

10. In addition to my property many others have been set on fire by this same railroad, or more properly speaking, by its locomotives.

> I present the deed in which is set out the acquisiton of the property to which I have referred, and a copy of the schedule of the property (*hijuela*) which was assigned to me in the estate of my deceased husband, Manuel Cancino R. I add then to the things enumerated, the following:
>
> 1. There was adjudicated to me in the estate of my husband the claim to which the said fire has given rise.

This complaint was accompanied by a duly recorded copy of the deed of purchase referred to in the first paragraph of the things enumerated, as well as by the schedule of the adjudication of property made to the plaintiff in the succession of her husband, Manuel Cancino R., in which figures a claim against the Railroad Company of the North for damages caused by the burning of a house in the municipality of Usaquen, with all that was in it. This schedule of inherited property (*hijuela*), has also the corresponding notation of registry.

The judge allowed the complaint to be filed and ordered that the corresponding service thereof be made on the defendant, and that the parties be cited for a friendly conference, which was had, without favorable result. Dr. Julian H. Restrepo, being admitted as attorney for the defendant was served with the corresponding transcript of the complaint (*recibio en traslado la demanda*) and answered, saying:

> I deny the existence of such damages; I deny their supposed cause; I deny that any house whatever belonging to the plaintiff has been destroyed; I deny that any house of the plaintiff has been burnt, that it was done by sparks thrown out by any locomotive of the Railroad of the North; I deny that the plaintiff was the proprietress of any house whatever situated in the municipality of Suba; I deny that the plaintiff was the proprietress of the articles to which the complaint alludes as contained in the sup-

> posed house, articles whose existence I do not acknowledge; and I deny finally that sparks thrown out by a locomotive of the Railroad of the North set fire to any house whatever with the articles therein contained. In consequence I ask for the discharge (*absolucion*) of the defendant. I deny and do not recognize that in the title 34 of book 4 of the Civil Code; in law 62 of 1887, and in the most general principles of natural equity there are provisions or precepts favorable to the pretensions of the plaintiff, or which are pertinent to be invoked in her favor.

Thereupon he denies all the facts upon which the complaint rests, with the exception of the sixth, for he agrees that General Davila is the owner (*dueño*) of the Railroad of the North, and says he does not acknowledge the law and fact (*hecho y derecho*) on which the complaint depends.

Subsidiarily he urged the following peremptory exceptions:

> Unfounded or premature complaint.
> Lack of cause of action against the defendant.
> Lack of cause of action in favor of the plaintiff.

As the foundation of the first of these exceptions it is said: "If the fire had existed and had been caused by carelessness or neglect, it would be a criminal act (*delito*) and the civil action might be instituted at the same time as the criminal but not before and should be tried before the judge of criminal jurisdiction."

The basis of the second is that "if the fire had existed, and had been caused by the negligence or carelessness of those called in the complaint the agents of General Dávila, the latter would not have to respond, or would not be responsible for the said fault or negligence.

As the foundation of the third, it is alleged, "because the credit adjudicated is not the same claimed by the plaintiff; because the ownership of the articles whose

existence is disputed and which it is said were destroyed, has not been proven; and because document number Eight Hundred and Thirteen (?) which appears in the record is null through uncertainty in the location of the property sold."

The case went to trial upon the facts, and, only the party plaintiff produced the following:

An ocular inspection of the archives of the enterprise of the Railroad of the North, which showed that there was evidence of a communciation which the engineer of the enterprise, on the 20th day of June, 1893, directed to Dr. Antonio Roldan, advising him that two houses on the line of the railroad at kilometer 10 had been burnt the preceding Saturday, one belonging to Bishop Rueda and the other to the widow of Mr. Cancino, and adding "however they were not inhabited and they were burnt before others that were nearer to the railway because they were on a gradient on which the engines have to make steam and therefore throw out more sparks and to a greater distance." There was also found a public instrument executed under date of March 7th, 1893, No. 350, in which it is set forth that Juan Manuel Davila, as concessionaire of the enterprise of the Railroad of the North, conferred upon Dr. Antonio Roldan an ample and general power of attorney for the administration of the enterprise. In many of the documents in the office, which the judge and the witnesses had before them, there was evidence that Dr. Alejo Morales B. was Engineer of the railroad, and that he was such in the month of June, 1893.

Among the declarations received, figures in the first place that of Moteo Cortes, who affirms that he sold to Mrs. Jaramillo de Cancino, during her married life with the deceased Manuel Cancino, a house situated at the point called El Batan, in the jurisdiction of Suba or Usaquen; that after it was sold many and valuable

betterments (*mejoras*) were made in that house so that it acquired a value much greater than it before had; that he saw the house after the betterments were made, and saw that there was in the house much furniture, some of it very fine; that coming from Zipaquira one day in the month of June, 1893, he saw that the house referred to was on fire, and at that very time learned from all those who were present and witnessed it, that the burning of this house and of another adjoining it, which he also saw on fire, had been produced by sparks thrown out by a locomotive of the Railroad of the North; that it is public and notorious, because it has been heard by many persons that the railroad was the "incendiary" of the house of Mrs. Jaramillo as well as that of Bishop Rueda; that the first of these houses was very close to the line of the railroad, and that this line was constructed after the house was already built; that the house as well as all the goods which were in it, was totally destroyed by the fire. (Folios 3 and 4 of folder No. 2.) ("*Cuaderno*" *No. 2.*)

The witnesses Barbara Suarez, Manuel Siaz, Zoilo Arevalo Eleuterio Tobar, and Ricardo Cayativa (pages reverse of 13 to 15) assert uniformly that they saw the burning of the house of Mrs. Jaramillo de Cancino, and that it was produced by sparks that one of the locomotives of the railroad threw out, the second of said witnesses adding that no precautions whatever had been taken to prevent damages to the houses adjacent to the line.

The expert opinion or report which appears on pages 23 to 25, of Timoteo Mora and Nicanor Sánchez Dominguez, who uniformly and in view of the proofs produced, conclude by estimating the house which was burnt at three thousands pesos; the furniture and goods contained in it at one thousand pesos; and the rents

of the house for the period elapsed from the 16th of June, 1893, to the 10th of September, 1895, when they rendered their report, at the rate of fifteen pesos per month, at the sum of four hundred and two pesos, which gives a total of four thousand four hundred and two pesos (P 4,402). This expert opinion was approved by the judge without objection by the parties.

The period of taking testimony (*termino probatorio*) being concluded, the briefs of the parties submitted, and the parties being cited for sentence, this was pronounced by the judge of the first instance the 13th day of February, 1896, which sentence in its dispositive part reads thus:

> For the reasons set out, the court administering justice in the name of the Republic and by authority of the law, resolves:
>
> First. That the peremptory exceptions urged by the defendant are not proven.
>
> Second. Let Juan Manuel Dávila be condemned to pay to Mrs. Cecilia Jaramillo de Cancino the sum of four thousand four hundred and two pesos at which the damages were estimated.
>
> Third. Let the same Mr. Dávila be condemned to pay the costs of the trial which will be taxed by experts.

Against this verdict the attorney for the defendant interposed an appeal, and the appeal being allowed, the record was remitted to the Superior Tribunal of Cundinamarca, where a new ordinary term (*termino probatorio ordinario*) was solicited and obtained, and a further extraordinary probatory term of 120 days for the conduct of certain proceedings in the city of London, which was not obtained.

The proofs produced by the appellant were the following, which the Tribunal enumerates thus:

(*a*) Interrogatories answered by the plaintiff. Of the responses given by her it is only necessary to mention the first and second, in which she confesses that she has not instituted, outside of this, any other judicial action, either civil or criminal, relating to the fire, the origin of the controversy.

(*b*) Certificate of Adriano Tribin, Manager of the Sabana Railroad, as to the condition in which the engine *Santander* was found, which was good, when it was returned to that enterprise on the expiration of the contract of lease which Davila entered into with the Sabana Railroad in July, 1892.

(*c*) Copy of decree of the second judge of this circuit in which it is recognized that Antonio de Jesús and Manuel José Cancino are the heirs of Manuel Cancinó R., and a certificate of Notary No. 2 of the same Circuit, in which it is said that there is no evidence that in the judicial distribution of the latter's estate any inventories had been adjudicated in the municipality of Usaquen.

(*d*) Copies of the marriage and death certificates of Manuel Cancino R. He married in November, 1889, and died in September, 1892.

(*e*) Declarations of Fernando V. Conde, Arquilino Márquez, José María Cárdenas, José Manuel Pérez, Louis Felipe Quiroga, Basilio Pinzón, Eliza López and Antonio Roldán.

The principal points concerning which the witnesses cited deposed, are these: "1st. That Juan Manuel Dávila was absent from the country on the day of the burning of the house in question; 2d. That the enterprise was intrusted absolutely to Dr. Antonio Roldán, the attorney in fact of Davila; 3d. That the engine or locomotive called *Santander* was the one which on the day of the fire passed in front of the house that was destroyed by the fire; 4th. That this engine was in charge of Tomas Pinzón on that date; 5th. That the latter

was a good employee, a skillful engineer, prudent, of good disposition, gentle and careful in the discharge of his duty; that Juan Manuel Dávila was scrupulous and exacting as to the selection of employees for the enterprise; and 7th, finally, that the engineer, Pinzón, neither ate nor lived in the house of Juan Manuel Dávila."

The time of taking evidence having expired and the legal proceedings of the second instance being concluded, the Tribunal pronounced its sentence, on the 7th day of May of the present year, which sentence ends thus:

> In consequence, administering justice in the name of the Republic and by authority of the law, the verdict appealed from is amended, but solely in so far as it condemned the defendant to pay the costs of the action. In everything else it is confirmed.
>
> The defendant will pay to the plaintiff by way of indemnification, one hundred pesos (P 100). Let it be published, etc.

Being personally notified of this sentence, on the 8th day of May, a recourse of cassation was interposed against it by the attorney of Dávila, by a memorial presented on the 5th of June, in which were alleged as the foundation thereof, the causes indicated by numbers 1 and 2 of article 2 of law 169, of 1896; and by a decree under date of the 7th of the same June the recourse was allowed, and the record was ordered remitted to the court, where it was "distributed "("*repartido*") on the 5th of July last.

The affair being given the proper substantiation an examination of the foundations of the recourse was thereupon begun, since it is permissible for the court so to do, for in it concur all the circumstances which the law demands for its admissibility, to-wit: Being interposed opportunely, and by a proper person, and the

sentence being one of those against which an appeal may be taken.

The recurrent (*recurrente*) after setting out the considerations contained in the sentence appealed from as the foundation of the confirmation of the verdict of the first instance, says in the petition in which he interposes the appeal:

> By your decision, and by the conclusions thereof, you have violated article 2341 of the Civil Code, without its having been proved that General Dávila had committed the crime or the fault, you have condemned him to indemnify.
>
> In so far as you consider the fire as an illicit act and as culpable, the former for violating the right of another, and the latter by reason of General Dávila not having proved his own personal diligence and care, you have violated this same article 2341 as well as article 1604, by having unduly applied it to this case, and by having interpreted it erroneously, falling also into an evident error of fact in affirming that General Dávila had not proved that he used all the diligence and care possible to prevent the fire.
>
> The evidence of your error of fact is manifest. The fire is not an act, it is the physical and necessary result of an act, and as such result can be neither lawful (*licito*) nor unlawful (*ilicito*), but harmless or prejudicial. The act producing the fire, that is the burning, is what may be lawful or unlawful. If the fire was caused by the sparks thrown out in passing by a locomotive, the passing or throwing out of sparks is the act which may be qualified as lawful or unlawful, but to so denominate the material results is to confound the moral with the physical, the right with the cause.

The recurrent then alleges that General Dávila should not have been condemned for the fault of another, for the sole diligence and care which could be exacted of him was the selection of his employees and that of being

severe in discipline, and that there was not only an error of fact but of law as well in holding that General Dávila had not proved that he was diligent and careful in performing the act of another. But admitting for the sake of argument that General Dávila did not give any proof of his care and diligence, he maintains that condemning him for not having produced that proof was a violation of articles 2341, 2347, 1604, 1757, and 63 of the Civil Code, 5th of law 62 of 1887, and 542 and 543 of the Judicial Code.

The Court proceeded to consider whether the violations pointed out exist. Article 2341 reads thus:

> He who has committed an offense or fault which has inflicted damage upon another is under the obligation of indemnification, without prejudice to the principal penalty which the law may impose for the offense or fault.

The recurrent maintains that in order that one may be held to this class of indemnification it is necessary that he shall have committed an offense or fault and that this offense or fault shall have inflicted damage on another; and he adds that if anyone has been damaged, without its appearing that the loss was caused by an offense or fault there is no cause of obligation either legal or moral. Therefore, whoever demands indemnification for damages through an offense or fault, must prove the damage and must prove the offense or fault causing it, and you, having excused the plaintiff from proving the last have violated article 2341 of the Civil Code.

It is certain that this article imposes on the author of an offense or fault which causes damages to another the obligation of indemnifying the latter, without prejudice to the penalty which the law may impose for the offense or fault committed: But this provision (*disposicion*) does not say that the delinquent is the only

one held to the civil indemnity, and on the other hand there are certain conclusive provisions, such as that of article 2347 invoked by the plaintiff, and which has served as the foundation of the sentence appealed from, to condemn General Dávila to the payment of the indemnification demanded; notwithstanding that neither the plaintiff nor the Tribunal have considered him a delinquent. Further, as it is maintained by the recurrent that such provision has been erroneously interpreted by the Tribunal, and that it ought not to serve as the foundations of that condemnation, it becomes indispensable to consider whether it has been well or ill applied.

That provision is the following:

> Article 2347. Every person is responsible not only for his own actions, for the purpose of making good the damage, but for the act of those who may be under his care.
>
> Thus, the father, and failing him the mother, is responsible for the act of the minor children who live in the same house.
>
> Thus the tutor or guardian is responsible for the conduct of the pupil who lives under his protection and care.
>
> Thus the husband is responsible for the conduct of his wife.
>
> Thus the directors of colleges and schools respond for the act of the students while they are under their care, and artisans and empresarios for the act of their apprentices and dependents in like case.
>
> But this responsibility will cease if with the exercise of the authority and care which their respective characters prescribe for and confer on them they could not prevent the act.

The Tribunal, after examining certain arguments of the defendant arising out of the terms in which the complaint is couched, and on which he depends to maintain the exceptions which he opposed to it, con-

cludes by establishing fundamentally that the intentions of the plaintiff according to the complaint itself was not to invoke in her favor the right of proprietress of the house destroyed by fire, but to recover a credit arising out of the fire itself, a credit which was adjudicated to her in the estate of her husband, because the house mentioned was acquired during the Cancino-Jaramillo marital partnership (*sociedad conjugal*); that there is no reason to doubt the identity of the immovable property to which the complaint refers, nor is the objection worthy of notice, that the complaint ought to have been directed against the Railroad Company of the North because it was so set out in the schedule of adjudication—granting that from what this document says it may not be deduced that this consideration is outweighed by the responsibility with which the plaintiff charges Juan Manuel Dávila—this last issue having been the subject matter of the present suit.

These antecedents being determined the Tribunal, referring to the proof adduced, establishes the following: That the sparks thrown out by one of the locomotives of the Railroad of the North were what caused the fire for the results of which the empresario is responsible, that the greater portion of the points of fact indicated by the complaint are proven. Therefore the Tribunal forthwith proceeds to consider the point of law, reduced to ascertaining if the concessionaire of the enterprise of the Railroad of the North is responsible civilly for the damages caused by the fire. Hence the study and application of the provisions of articles 2341 and 2347 of the Civil Code, the violation of which has been alleged by the defendant and which is now the subject matter of the Court's examination.

It is evident that the provision of the last of these articles assigns the responsibility not only for a person's own acts but for the acts of another when these are

executed by persons who are in the care or under the authority of others, in order that the latter may be responsible for the damages which the former may have caused to a third person, with the limitation and exception, however, that the responsibility of such persons ceases if by the exercise of the authority and care which their respective characters prescribe for and confer upon them they could not have prevented the act.

The Tribunal in applying this disposition to the case of the suit, establishes the responsibility of the defendant as empresario of the Railroad of the North under whose authority the engineer of the locomotive which caused the fire was serving; and applying the rule contained in article 1604 of the Civil Code, that "the proof of the diligence or care is incumbent on him who ought to have exercised it," the Tribunal deduces that the action having been directed not against the locomotive engineer of the railroad, but against the empresario, there is no necessity of ascertaining if there is a criminal responsibility on the part of the engineer, without for that reason pausing to consider if the civil action could have been instituted without regard to the criminal action even before the existence of law 169 of 1896—because it takes notice of the existence of law 62 of 1887, which reads as follows:

> The empresarios of railroads will be responsible for the damages and injuries which they may cause to persons and property by reason of the services of said roads and which may be imputable to carelessness, neglect, or violation of the police regulations which will be issued by the Government as soon as the present law is promulgated.

In spite of the provisions of this law, it is contended by the attorney for Dávila that the engineer of the railroad company could not be considered as his dependent or subordinate (*dependiente*) but solely as his employee

(*empleado*) and that for that reason he does not have to respond for the act which is being inquired into; but in the opinion of the Tribunal, if it is true that in order that the responsibilty of which the Civil Code treats may exist, there ought at the same time to be a dependence (*dependencia*) between the empresario and the agent of the act, it is no less true that this dependence may be recognized as a matter of law, nor is it necessary that the dependence be absolute; it suffices if the act be executed by reason of the service entrusted to the individual who serves under the empresario, for in all the functions with which he is charged he preserves the character of a dependent (*dependiente*) of the empresario.

Without questioning the correctness of this doctrine of the Tribunal, because the dependence or subordination of one man to another can not be absolute but only relative, it is clear on the other hand that the provisions of article 5 of law 62 of 1877, above quoted, without in any way mentioning the dependents, employees, or workmen of railway enterprises, makes their empresarios responsible for the damages and injuries which they may cause to persons or to property by reason of the services of the said roads.

For the rest, it is perfectly shown in the record that the house destroyed by fire already existed at the side of the road through which the railway was constructed, a circumstance which it is important for the Court to consider, because undoubtedly the aspect of the case would differ notably if the house had been constructed after the establishment of the railway line; and it was easy to foresee that this house as well as the others destroyed by fire, being thatched with straw, were in imminent danger of this fate from sparks thrown out by the locomotives, and that some diligence and care were indispensable in order to avoid it; and there is

not in the record any proof whatever that any care or precaution, either on the part of the empresario or the engineer, had been taken to prevent the fire, the proof that the empresario on his part had exercised much care in the selection of his employees not being sufficient in the opinion of the Court, because the diligence and care here treated of, is that which ought to have been exercised in order to prevent an injury that could have been easily foreseen; and if it is also taken into account that the record shows that the railroad caused the burning of five houses in a space of less than one kilometer, and this on different dates and at different hours, it must be deduced that not only was there no diligence or care to avoid a repetition of the damage, but that the matter was looked on with a certain amount of indifference; and apropos of this the Tribunal points out that it was not even proved that the locomotive in question was provided with the apparatus known by the name of "spark arrester" (*guarda chispas*), which, though it may not completely prevent the emission of sparks at least diminishes their number and tends to prevent the throwing out of the larger ones.

A notable French expositor in commenting on article 1383 of the Civil Code, which establishes the principle that simple negligence, as a fault (*falta*), imposes the obligation of making good the damage caused by it, asks, "When a person is negligent in the discharge of his interests, in the exercise of his rights, will he be responsible for the damages which may be caused by that negligence?" and he answers, "Yes, if such negligence impairs the right of another (*lesiona un derecho ajeno*) for every person is under the obligation of exercising care that his own actions do not work an injury to the rights of others. We are free to be negligent to our own hurt, but when our negligence harms another or impairs

his rights we are obliged to make good the damage which we have caused him."

And as it has been established in the sentence that in the case under discussion it is unquestionable that the proof of the diligence or care is incumbent upon him who ought to have exercised it, in conformity with article 1604 of the Civil Code already cited—the party recurrent maintains that the application of this article is erroneous, because it refers solely and exclusively to contractual offenses (*culpas contractuales*) and can not refer to cases involving penal offenses (*culpas penales*) or quasi crimes (*quasi delitos*). The Tribunal has already denied this theory expressed in the "*allegato*" of the second instance, affirming that it lacked foundation in law, since the article forms part of the title which treats of "the effect of obligations in general," which indicates that every class of obligations is there alluded to, now those arising out of contracts, now those of quasi-contracts, and now those springing from any other source recognized by the law, such as is the execution of an act which has inflicted injury on another.

The Court holds, as the Tribunal has held, that in conformity with our legislation a distinction can not be made between a so-called contractual offense (*culpa contractual*) and a quasi-criminal offense in order to maintain that it is clear, when the first is treated of, that the proof of diligence and care is incumbent on him who ought to have exercised it; for even if it is maintained, as the recurrent says, that article 1137 of the French Code is not applicable to all kinds of obligations but solely to those derived from contracts, the same can not be said of article 1604 of our Civil Code, which contains a more ample and general rule, limited solely by cases determined by the law or excepted by agreement between the parties. And, as the attorney for the party demandant points out, the cited article of the French

Code is included in title 3 of book 3 which treats of "Contracts or conventional obligations in general," while our article No. 1604 forms part of title 12 of book 4 of the Civil Code, a title which establishes the effect of all obligations, not alone those which are derived from contracts, since article 1494, the first of book 4 (above referred to), begins by enumerating the sources from which those obligations arise, and one of these is an act which has inflicted injury or damage on another person, which has nothing of the contractual. And if in conformity with articles 2341 and 2347 of our Civil Code, which have been examined, it is undeniable that there are obligations which arise from quasi crimes, whether one's own or those of persons for whom one is bound to respond, it is necessary to admit that, in accordance with article 1604 of the same code, the persons to whom the responsibility is imputed for his own negligence or that of his subordinates ought to prove his care and diligence.

And even supposing that it could be admitted that article 1604 refers solely to offenses growing out of contracts, it would be from every point indefensible that it should pertain to the plaintiff to prove the fault of the defendant rather than that the latter should be the one to prove care and diligence, as is claimed by the recurrent—for such a doctrine can have no foundation either in law or in any principle of jurisprudence.

From what has been resolved up to this point the Court deduces that there has been no violation or erroneous interpretation of the legal provisions which have been cited, nor of article 1757 of the Civil Code nor of articles 542 and 543 of the Judicial Code, which the recurrent also alleges—because there could have been no violation of these articles since the enactment of article 1604 of special and preeminent application, which establishes the principle that the proof of the diligence and care

which the defendant should have exercised is to be furnished by him, rather that this should fall to the part of the plaintiff. On the other hand it must not be lost sight of that there certainly is in the record, as has been pointed out, proof of the carelessness or civil fault of the defendant himself.

In regard to the violation of article 5 of law 62 of 1887, which has also been alleged, the Court has already examined it and has found correct the application which has been made of it to this case. However, it will be well to examine the objections which have been made to maintain that its application was incorrect.

It is said that the first part of the article simply means that the empresarios of railways must respond to persons who travel by those roads for damages which they and their belongings may suffer by reason of bad service. But aside from (the fact) that the article makes no such distinction and it is not given to the judge to make a distinction where the law makes none, it is certain that when there arose the necessity for legislation in the matter, by reason of the increase in the number of railroads, and of enacting special regulations concerning the responsibility of the empresarios, there already existed in our Civil Code and Code of Commerce regulations which establish the responsbility of empresarios of transportation enterprises, for damages caused to persons and things in transit by reason of the bad condition of the vehicles. (Art. 2072 of the Civil Code and 322 of the Code of Commerce.)

Consequently the allegation that there was need of legislation on this point can not be accepted, for there existed no void in the law that needed to be filled by the regulation of article No. 5 cited. What the legislator undoubtedly wished was to establish a special rule by virtue of which the empresarios of railroads (not the engineers or dependents) should respond for damages

caused to persons or their property by reason of the service of the railroads themselves, a rule which has come to be complementary to that of article 2347 of the Civil Code.

For the rest the Court cites as a precedent in the matter of responsibility of empresarios of railroads for damages caused to property by reason of the service of the said railroads, the sentence pronounced by the Court in the suit instituted by Ruperto Restrepo against the Manager of the Sabana Railroad Company (*"Compañia de Ferrocarril de Sabana"*) for damages caused him by the passing of trains through the Hacienda *"La Jabonera,"* a sentence which sustained that of the Tribunal of Cundinamarca, by which the said company was condemned to pay the damages demanded. (Sentence of the 19th of July, 1892, *Gaceta Judicial*, No. 353.)

The recurrent also alleges a violation of article 1501 of the Judicial Code, in that the sentence did not sustain his plea that the complaint was filed, as he alleges, before the proper time, arguing that the plaintiff could not properly institute a civil suit without at the same time, or prior thereto, commencing a criminal action. Although the Court has examined the conclusion reached in the sentence appealed from, that there was no need to investigate the criminal responsibility, dealing only with the civil responsibility established by article 5 of law 62 of 1887, and has considered it correct, it is also true that the plaintiff only demanded that the defendant should respond for a fault which, without giving rise to any criminal action gave the injured party the right to pecuniary indemnity. The alleged violation of article 1501 of the Judicial Code is, then, unfounded.

In the allegation (*alegato*) on which the appeal is based, as well as that presented before this court, there also is urged the second cause of cassation which is recognized by article 2 of law 69 of 1896, which is made to

consist in that the Tribunal failed to render judgment concerning one of the exceptions alleged by the defendant, that is to say, concerning the exception of the nullity of a writing, and in that it also failed to render judgment concerning the claims alleged by the litigants, inasmuch as it resolved a point which had not been the subject of the controversy, and failed to resolve that which really was such.

The first of these reasons is unfounded, because it suffices to observe that the judge of the first instance expressly declared that the exceptions alleged by the defendant were not proven, and the judgment of the Tribunal confined itself to confirming the sentence of the judge, amending it only in what refers to the payment of the costs, and besides, in the expositive part of said sentence the following is found on the reverse of sheet 73 ("*Cuaderno*") No. 3, which reads:

> What has been resolved up to this point besides establishing the civil responsibility of the empresario of the Railroad of the North for the damages caused by the fire treated of, makes it evident that the exceptions alleged by the defendant are unfounded.

The second of the reasons advanced in support of this contention is that the debate, according to the petitiatory part of the complaint, discussed whether General Davila ought or ought not to be condemned to pay the plaintiff for the damages which resulted from the destruction of a house belonging to her, and the articles therein contained, and that this being the sole subject of the controversy, the sentence was pronounced in favor of Señora Jaramillo de Cancino on the ground that she was vested with the character of an assignee of a credit against General Dávila in the legal distribution of her husband's estate.

It is true that the plaintiff asked that the defendant be sentenced to pay for the damage caused her by the destruction of a house owned by her, and the articles therein contained; but it is also true that in the fundamental facts of the complaint it is also expressed with all clarity that the house treated of had been acquired during the conjugal partnership of Jaramillo and Manuel Cancino R., and that in the liquidation of this partnership owing to the death of the latter there was adjudicated to the first a credit which existed by reason of the fire since the complaint was accompanied by a recorded copy of the respective adjudication.

It can not then be maintained that the only matter of controversy has been the claim for damages as proprietress of a house which no longer existed, for it is evident that this is not the only character in which the plaintiff has appeared in this suit, since she attached the title which she indicated as the foundation of her right—and her character as assignee of that title has also been a matter of controversy since the first instance, because in the sentence which was there pronounced the exception interposed by the defendant, of lack of cause of action on the part of the plaintiff, was declared to be unfounded, and the Tribunal on examining this point says.

> Now if we take into account that in formulating the petitiatory part of the complaint the statement "that the house referred to was the property of the plaintiff" might well have been omitted (for here we are not dealing with a suit for the revindication of that property, but the right to recover a sum of pesos arising out of its destruction, a right which the plaintiff acquired not as the proprietress of that property, but through the legal adjudication of her husband's estate), it is clear that this simple affirmation can in no manner change the essence of things—a

> maxim which if kept in mind by the defendant would have caused him to perfectly understand the true intention of his opponent.

Consequently the second cause of cassation alleged against the sentence is unfounded, for, as has been seen, it is certainly in consonance with the claims duly alleged by the litigants, it has not resolved points which have not been the subject of the controversy, nor has it failed to resolve any of the points which have been, it has not awarded more than was asked, nor has it failed to render judgment concerning any of the peremptory exceptions.

Finally, in the document presented before this Court there is also alleged the sixth cause of cassation recognized in article 359 of law 105 of 1890, in effect at the time that notice of the complaint was given, since it is alleged that in the personal notification of the complaint it was not set out that the record of proceedings in the secretary's office was at the disposition of the plaintiff (defendant?) as required by article No. 1 of the law cited.

To refute this claim it is sufficient to read the certificate which appears at the foot of page 16 and the beginning of page 17 of "*Cuaderno*" No. 1, which reads:

> On June 12th, 1895, the undersigned secretary of the 4th Circuit of Bogota, through the clerk of the secretary's office, Mr. Roberto Rojas D., notified General Juan M. Davila of the foregoing order and of that dated the sixth of the current year (in which the complaint is allowed to be filed, and which orders that notice and the transcript thereof be given), and for the term of five days the transcript (*translado*) of the complaint referred to in the last-mentioned order was turned over to him, and he signs.
>
> (Signed) JUAN M. DAVILLA,
> ROBERTO ROJAS D.,
> SANTIAGO WOOD,
> *Secretary.*

This certificate is evident proof that the personal no-
fication was made and that the transcript of the com-
aint was given to him for five days, as required by
ticle No. 1 of law 105, in which case there was no neces-
ty for stating that the record in the secretary's office
as at the disposition of the party for the simple reason
at it was delivered to him for the term of the tran-
ript; and if that delivery had not been sufficient it is
ated on the reverse of sheet 19 that on June 19th the
torney for the defendant, Julian Restrepo N., again
ceived the transcript of the proceedings; consequently
e alleged cause of cassation does not exist.

In conclusion, and as the recurrent spoke of errors of
t and law on setting up the first of the causes of cas-
ion, and as the Court has examined at length all of
e points which have been the subject matter of the alle-
tions advanced in support of that and the other causes
cassation, without finding such errors in the sen-
ce appealed from, the Court declares finally that such
ors do not exist, not only because it has found correct
application of the legal provisions on which the sen-
ce is based but also because in the sentence the
ts are found in conformity with the proofs set out in
record, without its having been shown that the
ged error of fact in any way appears in that record.

n virtue of all that has been set forth, the Supreme
rt, administering justice in the name of the Repub-
and by authority of the law, declares that there is no
son for setting aside the sentence of the Superior
bunal of Cundinamarca, dated the 6th day of May
he current year, against which the present recourse
assation was interposed.

he costs are against the party recurrent and will be
raised in conformity with the law.

Let notice issue, let it be copied and inserted in the Judicial Gazette, and let the record be returned.

(Signed) LUIS M. ISAZA.—ABRAHAM FERNANDEZ DE SOTO.—CARMELO ARANGO M.—BALTASAR BOTERO URIBE.—JESUS CASAS ROJAS.—OTONIEL NAVAS.—LUCIO A. POMBO.—ANSELMO SOTO ARANA, *Secretary*.

DISSENTING OPINION OF DOCTOR BOTERO URIBE.

I feel that I am not in accord with the foregoing sentence, for I believe that the sentence appealed from ought to have been set aside. I base this opinion on the following reasons:

Article 5 of law 62 of 1877, "by which certain things are prohibited" in respect to the construction and service of railways is a misfit provision (*disposición dislocada*) like many in the legislation of the country, in consequence of legislative intemperance, or the itching to patch the codes with articles of law suggested in any debate whatever, thus destroying the harmony and congruity of those works which are monuments raised during the centuries. This is an evil which naturally occurs when a change is made from one legislation to another. Without doubt it was believed in that year that the codes of Colombia contained no conclusive provisions which made the empresarios of railroads responsible for the damages caused by reason of the service which they rendered, or by reason of their passage, operation, locomotion, or traffic, and forgetting the special provisions which exist in the said codes concerning the subject, and very particularly those of titles 12 and 34 of book 4 of the Civil Code, which treat, the first of "The effects of obligations," and second "The common responsibility for offenses and faults" (*delitos y culpas*), the legislator drew up article 5 already cited, which tended to introduce more confusion than clarity into the matter. Because this intruded provision refers the judge to title

12, which treats in general of the effects of obligations, in order to determine that the proof of diligence or care (to which by contraposition the cited article 5 alludes) is incumbent on him who ought to have employed it and may refer him also, leading him into error, to title 34 which treats of the responsibility for offenses and faults (a special and subsequent title which regulates a different matter) in order to determine what persons are responsible, when and in what manner, for the acts of those who may be under their charge. This article also seems to require for its validity the issuing on the part of the Government of police regulations whose violations it was desired to provide against in the cases imputable to the empresarios of railways.

But what is notable is that it was desired to include so much in the provisions of the cited article 5 that, through not being properly drawn up, the responsibility of the said empresarios for damages and injuries is limited to those "which are caused to persons or property by reason of the services of the said railroads."

In the case which is being litigated between Cecilia Jaramillo and Juan Manuel Dávila, the subject matter of the cassation, the article cited is not applicable, because it is clear that neither the Railroad of the North nor its empresario were rendering any service whatever to the plaintiff when the loss occurred.

But in the hypothesis—which I do not admit—that the misfit article mentioned is applicable to cases similar to those under discussion, and consequently article 1604 of the Civil Code, which is found in the cited title 12, may also be applicable, which article treats of civil obligations, an article which throws the burden of proof of diligence and care on him who ought to have employed it; then it is not admissible that article 2347 of the same Civil Code be also applied, which article is found in title 34 already cited, which governs the matter of

indemnity to which he is bound who commits an offense or fault, according to the definitions given in articles 1 and 3 of the Penal Code; for this would be to mix provisions which treat of indemnity for damages and injuries caused by civil acts with provisions which treat of indemnity for damages and injuries caused by criminal acts. Such confusion, the result of the extravagant article 5 of law 62 of 1887, is an unqualifiable error of law. And in case—which neither do I admit—that the said article 2347 of the Civil Code is applicable and that it makes Dávila responsible for the acts of others, because the said article provides that every person is responsible not only for his own acts, but for the acts of those who may be under his charge, then the latter part of that provision ought to be taken into account, which says, "But the responsibility of such person shall cease if, by the authority and care which their respective characters prescribe for and confer on them they could not have prevented the act." For it is set out in the record that Dávila was absent for days from Bogota and from the location of his enterprise, in Europe, that he left Antonio Roldán in charge of the railroad, that he (Dávila) was scrupulous in the selection of employees for the railway, that the engineer Pinzón was skillful and careful in the discharge of his duties; and because the engineer in charge of the locomotive *Santander* can not be likened to a minor child, to a pupil, a married woman, a student, or an apprentice, that is to say, a dependent, as subordinated in the handling of his engine as in the case of those mentioned, over whom Dávila could exercise *immediately* (note well this term) *immediately* all the authority and all the care which his respective character of absent empresario prescribed for and conferred on him, "in order to be able to prevent the act." All of which demonstrates the material impossibility in which Dávila found himself of preventing the fire which

is attributed to him, making him responsible for the fault of another.

The error is more apparent in reading in the sentence appealed from the following considerations:

"Now then: In criminal law every infraction defined and punished in the penal law constitutes an offense (*delito*). For this reason articles 1 and 3 of the Penal Code in force say, an offense (*delito*) is the voluntary and malicious violation of the law *by which any punishment is incurred*, and a fault (*culpa*) is a violation of the law, imputable but not malicious and voluntary, *by which any punishment is incurred.*" "Desiring then to know if a particular act constitutes a criminal or quasi-criminal offense (*delito o cuasidelito criminal*) or if it ought to be considered merely as a civil offense or quasi-civil offense (*delito o cuasidelito civil*), what must be ascertained is, whether in addition to possessing the qualities of unlawfulness, volition, and fraud or malice (for the *delito*) and unlawfulness, volition, and simple culpability (for the *cuasidelito*) the said act is defined and punished in the penal law; if that be the case it invariably takes the character of a penal offense or quasi offense or penal fault (*delito o cuasidelito o culpa penal*) as the case may be—a circumstance which prior to the promulgation of law 169 of 1896 prevented a demand for indemnity for the damages, without at least, at the proper time instituting the corresponding criminal action. (Articles 501 of the judicial code and 64 of law 100 of 1892.)

"Now then: That the act under analysis is unlawful can be doubted by no one, for it is clearly seen that the right of another is violated by it; that it was done voluntarily is also unquestionable, if it is kept in mind that it was done by persons who at the time of its execution were in the full possession of their intellectual faculties, and were not compelled by "*force majuere;*" a circumstance which clearly demonstrated its imputability—

and with regard to the question of "*culpable*" it is necessary to remember that, as has been said "*culpa*" (fault) is in many cases equivalent to mere carelessness or negligence.

"Our Civil Code recognizes three classes of "fault" or negligence (*culpa o descuido*), to-wit: "*Culpa grave*" which consists in failing to manage the business of another with that care which even negligent persons, or persons of little prudence are accustomed to use in their own affairs, which is equivalent to fraud or malice (*dolo*): *Culpa leve*, which is the lack of that diligence and care which men ordinarily employ in their own affairs, and *culpa o descuido levisimo*, which is the lack of that painstaking diligence which a judicious man employs in the transaction of his important business. (Article 63 of the Civil Code.)

"But will this quasi offense or fault have a criminal character, or will it be considered merely civil?

"That depends solely, as has been said, on whether our penal law assigns to it any punishment, for in that case it comes within the definition of article 3 of the code, concerning the matter; and of course it may be answered that the act in question has the characteristics of a criminal fault, for even though it was done without intention to injure, yet if it was done through negligence, imprudence, or carelessness, as must be considered the case here, from what has been said above, the Penal Code in force punishes it with a penalty of fine and imprisonment.

"In fact, article 863 of said code says:

> 'Article 863. He who shall set fire to any cleared land, stubble land, or dry pasture, without taking all the precautions which prudence counsels, according to the direction and force of the prevailing winds, the location of the place and the distance which intervenes between it and

buildings, ripe grain, forests, groves, or any other thing capable of being burnt; he who setting off fireworks or discharging firearms without due precautions; *and finally, he who by any method capable of causing a fire, shall cause the same in the things of another* NOT WITH INTENTION, BUT THROUGH NEGLIGENCE, IMPRUDENCE, OR LACK OF PRECAUTIONS, shall suffer an arrest of fifteen days to three months and a fine of twenty-five to five hundred pesos.'

"This penal provision takes in without doubt the case which is being investigated, because it imposes the penalty of fifteen days to three months imprisonment and a fine of twenty-five to five hundred pesos on him who, in general by any method of causing a fire shall cause the same in the things of another, *not with intention but through negligence, imprudence, or lack of precautions*: So that the obligation which it is attempted to make effective has a clearly recognized source in the provision of article 2341 of the Civil Code."

From which it is deduced that the burning of the house of Cecelia Jaramillo is invested with the characteristics of the fault (*culpa*) defined in article 863 of the Penal Code—there being "an imputable but not malicious and involuntary violation of the law by which any penalty is incurred," the locomotive engineer is responsible both for the penalty and for indemnity for damages and injuries, and not Juan Manuel Dávila who was thousands of leagues distant from the place where the affair occurred.

Error after error has occurred in this case, ever since the action was instituted, "The foundation of right of this demand," says the plaintiff in her complaint, "arises out of the pertinent provisions of Title XXXIV of Book IV of the Civil Code, those of law 62 of 1887 and the most general principles of natural equity." Now it has been seen that the title cited treats of indemnity for

damages and injuries by reason of offenses and faults (*delitos y culpas*) defined in the Penal Code, and that the law cited indicates certain cases of indemnity for damages and injuries arising by reason of civil acts so that the origin of the right, cause or reason of the demand was mistaken or misjudged—and as rights of action mutually opposed to each other can not be exercised in the same complaint, according to article 269 of the Judicial Code, both the sentence of the first instance and the sentence of the Tribunal in which it was reviewed have fallen into lamentable confusion.

Even the very technicality of the sentencing Tribunal never used in Colombian codes, throws into relief the contradictions of its judgment both in manner and form. The expressions "*delito, ó cuasidelito civil*" and "*delito ó cuasidelito criminal*" are not acceptable by the bench and bar of the country.

In my opinion what is proved in the proceedings is that by reason of the burning of the house of Cecilia Jaramillo he who is responsible for the damages and injuries is the engineer in charge of the locomotive *Santander*, who is the one who committed the fault defined in the cited article of the Penal Code—but that in conformity with article 64 of law 100 of 1892 it is necessary to institute the civil action and the criminal action at the same time, and if they are not instituted at the same time it is necessary to await a condemnatory verdict in the criminal action in order to be able to institute the civil action. Article 39 of law 169 of 1896, which although pertaining to the law of procedure has a substantive character, is not applicable to this case because that law was not in force when the facts treated of occurred, when the complaint was filed.

I believe it is proper that the empresarios of railroads should make good damages and injuries which may be caused by negligence or carelessness occurring in their

enterprises but taking into account the provisions of titles 12 and 34, book 4, of the Civil Code in order to apply them according to the circumstance of the case in controversy, and always with subjection to the general principle involved by the sentence appealed from—that he who commits an offense or fault is the one truly responsible. As the provisions of the said article 5 and of the titles cited are restrictive and penal they should be applied strictly in the prescribed manner; and as article 2347 of the Civil Code is exceptional, its exceptions ought not to be amplified, because in addition to disturbing the harmony of the said code there is a risk of inflicting an injustice, as I believe has happened in pronouncing the sentence appealed from.

The French legislation, insofar as this principle is concerned, is totally foreign to the present case.

From all of which I am of the opinion that the judgment appealed from contained error of fact and law and ought to have been set aside.

Bogota, the 17th day of December, 1897.

(Signed) BALTAZAR BOTERO URIBE ISAZA.—FERNANDEZ DE SOTO.—ARANGO M.—CASAS ROJAS.—OTONIEL NAVAS.—POMBO.—ANSELMO SOTO ARANO, *Secretary*.

ORDINARY SUIT INSTITUTED BY HARRY COMPTON AGAINST ROSENDO ALVARADO.

(Opinion rendered by Magistrate Señor Fabrega.)

SUPREME COURT OF JUSTICE,
Panama, May 11, 1917.

Submitted: Ulises Noguera, substitute attorney for Harry Compton, instituted before the 4th Judge of the Circuit of Panama on the 29th of May, 1915, the following complaint:

I, Ulises Noguera, in the name of Mr. Harry Compton, whom I represent as special substitute attorney, make complaint against Rosendo Alvarado, so that he may be condemned to pay to my principal, Mr. Harry Compton, after due proceedings in an ordinary civil suit, the sum of $5,000 as an indemnification for damages sustained on account of the injuries inflicted by his fault upon the person of Mr. Harry Compton. And subsidiarily I ask an indemnification as personal damages those that were found by the experts.

I base the complaint upon the facts which are numbered separately as follows:

1st. On the 29th of November of the last year, 1914, between four and five o'clock in the afternoon, Mr. Rosendo Alvarado was driving the automobile belonging to him on Central Avenue of this city marked "Ford," which showed a license from Panama numbered 85 and another one from the Canal Zone numbered 192.

2d. The automobile was going in the direction from the railroad station toward the center of the city, and was going along on the right side of Central Avenue and was going at a speed of not less than 15 miles an hour.

3d. Mr. Harry Compton was leaving the sidewalk to take the tramway to go to his house when Mr. Rosendo

Alvarado, being in front of the store of Justo Arosemena, ran over Mr. Compton with his automobile, which threw Mr. Compton to the ground and dragged him beneath the automobile for about 15 feet.

4th. When Mr. Rosendo Alvarado stopped the automobile Mr. Harry Compton was lying on the ground unconscious, with a fractured arm and a broken foot and he was taken to Ancon Hospital. (Mr. Alvarado declined to take Mr. Compton to the hospital in his automobile.)

5th. Mr. Harry Compton remained in the hospital sick on account of the injuries resulting from the collision, for three months, and during the first week he was unconscious.

6th. Mr. Harry Compton remained lame for life in one foot, on account of the collision of which he was the victim.

7th. Mr. Harry Compton owes to Ancon Hospital $500 for the three months that he remained there sick on account of the collision.

8th. Mr. Harry Compton, for the same reason, has ceased to earn during those three months $300 as the Director which he then was and is to-day of the Panama College and Minister of the church annexed to the said college.

9th. The damages suffered by Mr. Harry Compton, with the lameness for life, is justly valued at $5,000. The legal foundation for the suit will be found in the provisions of Articles 2341, 2343, 2347, 2356, 1494, and 1613 of the Civil Code, and Art. 39 of Law 169 of 1896.

I demand the costs.

Mr. Harry Compton, Mr. Rosendo Alvarado and myself are residents of this district. My power of attorney accompanies this complaint."

The defendant answered the complaint as follows:

"I, Rosendo Alvarado, resident of this city, answer the complaint which has been instituted against me by Mr. Harry Compton through his attorney.

"I do not agree that I am obliged to pay any sum to Mr. Compton as indemnity for the injuries that he may have suffered on account of the collision with the automobile that I was driving along Central Avenue on the 19th of November, 1914, because that occurrence does not make me responsible for any crime or fault, because I did not act maliciously nor negligently or with imprudence, want of care, or any other cause that I could have or should have avoided. I managed my automobile without contravening any laws or regulations, and if Mr. Compton received injuries it was due to his lack of care or prudence.

"In respect to the facts I answer as follows:

"The first statement of fact is true.

"The second statement of fact is not true. I was coming from the center of the city to the station, and was not going at the rate of 15 miles per hour, but at a much less speed.

"The third statement of fact is not true. It was not in front of the store of Don Justo Arosemena where the occurrence took place, but in front of the soda water factory, and it is not true that the automobile dragged Mr. Compton about 15 feet, because I stopped the automobile immediately.

"In respect to the fourth statement of fact, I say I do not know the effect produced on Mr. Compton by the collision which he suffered. The statement that I refused to take Mr. Compton to the hospital is false. The occurrence had hardly taken place when I saw them put him in a coach, and then I went on to take my family to my house, and I went immediately thereafter to the police station to report what had happened.

"I am not informed as to the statements of facts Nos. 5 to 9.

"I deny the applicability of the provisions of law on which the complaint is based.

"Panama, July 19th, 1915.

(Signed) ROSENDO ALVARADO."

Suit was opened to the admission of evidence, and on the fourth day of April, 1916, the Judge rendered final judgment, wherein, after stating the facts as above set forth, the following statement is found:

"After the suit was allowed, the defendant was duly notified thereof, and he answered denying the facts stated in the complaint and the law invoked. The suit was opened for the admission of proof, and both parties submitted the evidence appearing in the record, together with their respective arguments thereon, and the parties having been cited to appear the moment had arrived to render the sentence in the case, and to that end the following is considered:

"The suit instituted by the plaintiff against the defendant consists of the material damages that he alleges have been occasioned to him on account of the collision of which he was the victim, caused by the defendant, and in the pecuniary loss which he states consists in the plaintiff having ceased to receive his salary and other emoluments during the time of his sickness resulting from the collision, and in the expenses incurred by him on account of this same sickness.

"A considerable number of declarations of witnesses have been adduced by the plaintiff to establish his allegations, but proof does not result from them to show anything but the fact that the plaintiff Compton was run into by the defendant Alvarado on the evening of the 29th of November, last. It does not appear from the evidence that as a result of the collision the plaintiff suffered any physical injury, much less the damages which

he claims, because there is no proof tending to establish the fact that Compton had suffered any incapacity on account of the said collision, or that by reason of the same he had ceased to receive the salary and other emoluments which he claimed. What alone is demonstrated, as has been said, is the fact that Compton was the victim of a collision on the evening of the 29th of November of last year and the responsible author of that collision was undoubtedly the defendant, but it has not been proved that by reason of the said collision Compton has suffered the damages which he claims. In fact there is no proof whatever to demonstrate that Compton was incapacitated during the three months, that by reason of the collision he had to be taken to Ancon Hospital, and that he had to remain in that establishment for the time alleged in his complaint, or that he suffered a lameness for life on account of the collision, that is to say, the plaintiff has not proved these essential facts from which necessarily the damages claimed might be deduced. Hence, it appears that the plaintiff has not proven the essential facts of his complaint, and in consequence a judgment for the defendant must follow.

"Therefore, the subscribing judge, administering justice in the name of the Republic, and by authority of law, absolves the defendant from the charges of the complaint, and releases both parties from the payment of costs."

Oscar Teran, the principal attorney of the plaintiff, appealed and brought suit to the Court (Supreme Court) where a new period for the admission of proof was granted, and the time having arrived to render final judgment, we pass to examine the result of the record, in order to determine what may be proper, and in accordance with the following opportune considerations:

Various declarations of witnesses were adduced by the plaintiff to prove that Alvarado was the author of the injury received by Compton; but inasmuch as this is a civil proceeding the confession of a party is sufficient, and this results from the answers to the interrogatories made by Alvarado on the 23d of June, 1916 (pp. 58) in which he admitted the following facts: That on the 29th of November, 1914, between 4.00 and 6.00 of the evening, he ran into Harry Compton on Central Avenue; that he, Alvarado, could not stop the automobile at once which struck the said Compton; that the deponent did not have a license to operate automobiles in Panama, and that he had no license to operate automobiles in the Canal Zone. He never went to the Canal Zone, and, therefore, he had no need of a license there.

The witness A. S. de Souza says that Alvarado's automobile was going at a high speed, but that he could not state the number of miles at which the automobile was traveling; Thomas J. Rogers fixed the velocity of the automobile at 20 miles per hour; Felix B. Lowe says that may be the machine was traveling at the rate of 15 miles an hour as was asked him, although he could not be certain as to the speed of the automobile; and the witness J. R. Frost said that he had always seen Alvarado operate the automobile at an uncommon speed, without having experience in its operation, that on repeated occasions he left his automobile in the streets on account of some accident, and on other occasions he would take the automobile to the garage injured in some way. The questions propounded to this witness showed that there had been a disagreement between him and Victor Manuel Alvarado, brother of Rosendo, on account of the car which belongs to Victor Manuel, the latter having demanded $11 from Frost because of

his having broken the bumper in trying to straighten it. Frost, in his testimony, said that the bumper was in ruins.

According to the testimony of Elizondo Herrera, Compton was President of the college situated in Panama near the government palace, and he was Director of the Methodist Church which is conducted at the same place, and that by reason of those services Compton received a salary, the amount of which was unknown to the witness; and Charles William Port testified that the salary was $125 monthly.

Drs. A. B. Herrick and T. W. Earhart, of Ancon Hospital, stated what follows in respect to the incapacity suffered by Compton: That the said gentleman was treated in the hospital and that he had a serious fracture of the right tibia; open wounds in the head and right leg; fracture of the left clavicle, and internal contusions of the lungs and kidneys; that he remained in the hospital from the 29th day of November, 1914, until the 29th day of January, 1915, and that from that day until the third day of March he was compelled to go to the hospital three times a week, more or less, to be treated as an outside patient; that on the 3d of March he suffered an accessory operation and remained in the hospital to the sixth of the same month; that on the last date he left the hospital; but it was necessary for him to continue receiving medical assistance for a period of three months, more or less; that as a result of the injury Compton was left with a lameness for life, consisting in the lack of certain movements of the right foot; but that he can walk notwithstanding that defect.

The defendant on his part adduced the following evidence: José Santoll testified that at the moment that the automobile was passing at a moderate rate of speed, Compton attempted to cross the sidewalk, and

was unable to, being struck in the legs by the machine, and that Alvarado stopped the car instantly and in that way prevented a more serious accident; and that Compton was left stretched out in the street in front of the automobile.

Mr. Luis E. Lopez said that the automobile was going at a moderate rate; that he knows by hearsay from Doctor Lowe that the one responsible for the collision was Compton, on account of his having attempted to cross the street at the moment at which the car was passing, which was running toward the railroad on the left side; that the witness de Souza arrived at the moment at which Lowe and another individual were putting Compton in a coach, and that in the presence of the witness and of Victor Manuel and Rosendo, Lowe said that Alvarado was not responsible for the collision and he promised to testify in that sense; but Lowe did not come to the office to make his statement.

David Mercado stated that as a mechanic he has handled for considerable time Alvarado's automobile; that he knows that the bumper and the glass of one of the lights were broken in Frost's garage; that he knows that the car did not receive any blow or injury caused by Rosendo Alvarado because the latter always travelled slowly, and he knows this because witness accompanied Alvarado always and he was never required to repair any injury to the car; that for the same reason he knows that Alvarado is competent to manage the car; that a lame man, an American, or an Englishman offered him money to testify against Alvarado, but he declined the proposition.

Roberto Villa says also that a lame white man, English-speaking, went on two occasions to look for David Mercado, and on the second occasion he proposed to him that he testify in his favor and against Rosendo Alvarado.

Alberto B. Abarrio says that in his opinion Alvarado was competent to manage an automobile marked "Ford." On some occasions he has seen him going through the streets, driving slowly, but that he does not know whether he travels at the same rate all the time: and finally there appears the following police information:

"November 29, 1915.

"At 5.30 p. m. there appeared at this station Mr. Rosendo Alvarado, to give notice that while passing with his automobile along Central Avenue the car collided with an American citizen, causing him a wound in the face, and according to the testimony given at this station Antonio Marquez R. and the Señor Rosendo Alvarado the one responsible for the said collision is the American, because he threw himself on the car, something which Mr. Alvarado could not avoid. Said American took a coach and went to Ancon Hospital.

"That no complaint has been made against Mr. Rosendo Alvarado in respect to the excessive speed of his automobile.

"Given in Panama on the third day of the month of July, 1916."

There was brought to the record the proof of the expert appraisal of the damages suffered, and this proof resulted in the following: The expert, Eduardo Navarro, fixed at $100 the expenses of the hospital, the only expenses that he took into account, for the reason that in his judgment there has been no lameness for life, and the plaintiff is again engaged in his profession; the expert, Percival C. Cunhal, after going into many considerations touching the material and moral damages inflicted on Compton and his family fixed the indemnity at $10,000; and the expert Alfonso Preciado, who was named as the third appraiser by the Court, declined to give his verdict because he was not

informed as to the material damages that Compton may have suffered or the expenses incurred by him to effect his cure.

Some declarations of witnesses taken outside of the suit by the defendant, but presented during the term fixed for the admission of proof, were not considered, because they had not been ratified in the suit. Those declarations, far from favoring him, are prejudicial to Alvarado, because those witnesses state that Compton attempted to cross Central Avenue, notwithstanding that Alvarado was sounding the horn and some other persons cried to him that he could not cross. This indicates that Alvarado had sufficient time to put on the brake and check the velocity of the car or stop it, so as to avoid the accident. From the proof presented on the trial it appears that Alvarado is the author of the damage caused to Compton, and there is nothing to raise the presumption that he, Alvarado, intentionally caused the injury, and therefore it would seem that it resulted from the want of care on the part of the one or the other of them, because it is not admissible that Compton intentionally exposed himself to such a danger. The higher the efficiency possessed by a chauffeur, the lesser the danger of a collision, and in a crowded thoroughfare like Central Avenue, in which there is always coming and going coaches and automobiles, tramways, etc., and this especially so on a Sunday, which was the day on which the occurrence took place, pedestrians can not be required to await until the street is completely free before crossing; it is at this time that drivers of automobiles should know perfectly how to manage them and display great care to avoid accidents, and if as occurred in the present case the author of the damage was without a permit from the authorities to drive the car, and in doing so contravened the police rules, the presumption is against him, and it was nec-

essary for him to fully prove that the pedestrian placed himself within reach of the car in a foolhardy manner and that notwithstanding all of the care necessary and sufficient it was impossible to avoid the foolhardy act of the person injured; but this proof is lacking in the record because there only can be found the testimony of Santoll which is not any more than the opinion of the witness that the car could not avoid striking Compton's leg; and the testimony of Lopez which is hearsay as coming from Lowe; and Lowe as not having ratified Lopez's statement.

Although the defendant was absolved in the first instance because the amount of damages was not shown, this proof has not been perfected in the second instance. As a matter of fact, it appears from the evidence of one witness only that Compton received 250 pesos monthly ($125) and hence this point not being duly established, the amount that he failed to earn while he was incapacitated can not be appreciated. It does not appear how much he paid for his treatment in the hospital, nor for the surgical operation that was performed on him, nor the cost of the treatment which he received as an outside patient.

And finally, the indemnity that he should receive on account of the lameness that was left to him for life has not been proven. The assessment of damages by the experts in this case is very deficient, because an assessment made tentatively can not be accepted, and even this proof is incomplete by reason of the fact that the two experts named by the parties were in total disagreement and the other refrained from expressing his judgment. The following results from this situation; the defendant can not be absolved, because it has been proven that damages were sustained, and neither can the defendant be condemned capriciously to the payment of a sum certain. Therefore, it would seem equitable

and legal to remit the parties to another suit in which the only thing to be proven is the amount of damages. Therefore, administering justice in the name of the Repubic, and by virtue of the law, the Supreme Court revokes the sentence of the trial court and condemns Rosendo Alvarado to pay to Harry Compton the sum that may in a separate trial be proven to be the amount of prejudice suffered by him on account of the material damage suffered and by way of ceasing income (*lucro cesante*).

There is no special condemnation in costs in the one or the other instance. Let this be copied, notified, published, and returned (to the lower court).

(Signed) ALFONSO FABREGA,
(Signed) MANUEL A. HERRERA L.
(Signed JUAN LOMBARDI.
(Signed) E. URRUTIA DIAZ.
(Signed) JERARDO ORTEGA, *The Associate Judge.*
(Signed) M. A. GRIMALDA B., *Secretary.*

The foregoing is a translation of the judgment rendered by the Supreme Court of Panama on the 8th day of May, 1917, as the same appears in the Spanish Text in the *Registro Judicial* dated June 6 1917, being Vol. XIV, No. 38, Pages 357 to 360.

OROZCO *vs.* PANAMA ELECTRIC COMPANY.

SUPREME COURT OF JUSTICE,
Panama, October 5, 1918.

Submitted: With special power from Emilia Orozco, Eduardo Chiari instituted an ordinary civil suit against the Panama Electric Company, represented by George Edmund Ford, asking that the said company be condemned to pay the plaintiff the sum of three thousand balboas, or whatever sum that may appear to

be just upon the assessment of the experts, in reparation for the damage that has been caused to her by the death of her son, Eliseo Masa Orozco, which occurred on the 3d of March of the present year, as a result of his having been injured by car No. 29 of the urban tramway belonging to the defendant enterprise, which car was operated by motorman No. 129, José Gómez. And in addition she demanded the costs of suit.

The trial terminated, on first instance, by sentence of June 11th last in which the Second Judge of the Circuit condemned the defendant company to pay to the plaintiff the sum of three thousand balboas as well as the cost and expenses of the suit, which were assessed at three hundred balboas, that being the value of the work done according to law.

Both parties appealed from the sentence. The plaintiff argued that damages in excess of three thousand balboas had been proven, and, notwithstanding that, the inferior tribunal limited the judgment to the sum metioned, basing it on the fact that that was the amount demanded in the complaint. In this instance a new period of proof was allowed, which was utilized by the parties who adduced the proof desired by them, and, arguments thereon having been heard, the case has reached the stage for final decision.

The plaintiff limited her action for damage to the sum of three thousand balboas, adding that she would abide by the amount fixed by the experts. Of course, the latter clause had reference to any sum awarded inferior to that demanded. If the plaintiff had said in the complaint that she asked for damages without stating the amount, or that the damages exceeded a sum certain then she might have asked the inferior tribunal to award the sum found due; but taking the complaint as drawn it is plainly deduced therefrom that she estimated the damages in three thousand balboas, but

that she would be satisfied with less than she asked if the experts considered that amount exaggerated. Let us suppose that the defendant enterprise had acquiesced fully in the law and the facts presented in the complaint. Could the tribunal enter a judgment for more than three thousand balboas? It would seem evident that it could not do so. If it is pretended that the cause of action had been proven on the trial, nevertheless the conclusion would be the same. This question aside, we will enter upon a ful examination of the defenses adduced by the defendant.

The defendant first states that the suit is improperly brought because the motorman is charged with gross imprudence, an act constituting a penal offense under article 569 of the penal code, and consequently the law does not permit the recovery of damages resulting from a criminal offense before the accused has been declared criminally responsible It is convenient to study this preliminary question in view of the provisions relating to that subject contained in chapter I, title I, Book III of the Judicial Code.

A penal action springs from every penal offense against the persons who appear to be responsible, and also the civil action for the restitution of the thing, the reparation of the damage done, and the indemnification for the injuries caused by the penal act. The civil and criminal action may be instituted jointly, and so instituted they should be tried and decided in the same proceeding in which the corresponding criminal procedure shall be observed. The civil action may also be instituted separately. Neither the pardon nor the extinguishment of the penal action prejudices the civil action of the offending party or parties, to demand a restitution of the thing, the reparation of the damage caused, and the indemnity for the injury suffered. Neither does the sentence of acquittal affect the case

unless the acquittal is based on the fact that the damage done resulted from a lawful act executed without any imprudence whatever; that is to say, by mere accident or fortuitous cause, among other things. Neither does the extinction of the civil action carry with it the penal action that arises from the same offense or fault. The absolving sentence in a suit instituted to enforce the civil action is no obstacle to the exercise of the corresponding penal action.

The legal precepts which have been condensed in the preceding exposition demonstrate beyond any rational doubt that the new judicial code is a complete departure from the system adopted by the legislature of Colombia that was in force in the Republic of Panama until the 30th day of September, 1917, according to which the civil action instituted for the reparation of damages could not be commenced separately unless judgment had been previously rendered in the criminal case, and establishes the system by which the injured party is given full liberty to make separate civil demand before or after the penal action has been resolved, or jointly with that action. The court understands that this system is more in accord with legal principles, and, in consequence, the action of the plaintiff Orozco is not improper inasmuch as the law authorizes her to proceed as she has done.

It is also alleged that in conformity with article 54 of the Penal Code, Gómez is the only one responsible for the damages for the injuries resulting from the offense which he committed, and that the tramway enterprise had nothing to do with the affair. This is a question which is intimately connected with the fundamental issues of the litigation, and which we shall examine at the proper time. Now, in order to proceed methodically, it is necessary to ascertain what has been proven on the trial.

Eliseo Masa Orozco, a working man of good habits, who was the only support of his mother, Emilia Orozco, 50 years of age more or less, came to a tom-tom dance about 3 o'clock in the morning, which was taking place in the house of John Hudson in Pueblo Nuevo de las Sabanas, and he remained there until four or half past four, amusing himself as any man of 30 years of age of his class might do. At that hour he took the road toward the city of Panama, arriving at a place in the Sabanas road known as Tumba Muerto. He was run over by car No. 29 of the urban tramway, and injured to such an extent that he died from the wounds and injuries received by him. The motorman saw Masa at a distance of twenty meters more or less, and instead of stopping his car he limited himself to sounding the alarm bell and giving out calls of alarm without using the brakes or putting on a counter current. Masa was so near to the tramway line or on the line (this point has not been clearly established) that the car overtook him and injured him horribly. These, in brief, are the facts fully proven, and it is not necessary to enter in details that would be of no aid.

The defendant contends that the car in question was provided with brakes and necessary apparatus for all emergencies, and if the motorman did not use them, and caused the death of Masa the enterprise is not responsible for the act, directly or indirectly, inasmuch as it had taken all the care and exercised all of the diligence of a good father of family to avoid the occurrence of such an accident. The defendant argues also that Gómez was a model motorman, and that in all of his service record not a single accident, previous to the one involved in the suit, was registered against him. These circumstances have also been duly proven with the exception of the antecedent of the motorman Gómez, in respect to which the proofs are extremely deficient,

and come in a general way from employees of the same defendant enterprise. It was necessary for the defendant to bring certificates of qualification, either from some authority or board authorized to issue them or from private persons or other enterprises by whom Gómez had been previously employed, in order to determine that he was in reality a good motorman, careful and diligent, and that he had never had fatal accidents such as that which occurred to Masa, or of similar gravity.

On the other hand the proof against the defendant shows that the motorman did not exercise due care at the moment of danger, and that the precautions that he took were not and could not be sufficient to avoid the accident which occurred. It was not a common case of a pedestrian who was crossing the line of a tramway within the zone prohibited by the regulations; neither has it been proven that when Masa was seen he was within less than twenty meters distant. Witnesses speak of twenty meters more or less, without fixing exactly the distance, and it is well known how difficult it is to determine precisely the distance in a case such as that now under consideration. The positive fact remains that the motorman Gómez saw Masa on the right-of-way, or very close to it, at a sufficient distance to permit him to stop the car, according to the opinion of the experts who have testified upon this point that he did not even endeavor to stop the car, and that he satisfied himself with giving the alarm without knowing whether the man who was on the line was in condition to leave the track, or if some extraodinary reason prevented him from doing so.

It is proper to bear in mind that the case occurred on the Sabanas road, at a lonely place, where frequently it is necessary to stop the cars because cattle get on the right-of-way, and obstruct the passage of the cars. If

in order to prevent a collision with an animal it is required by the regulations that the cars be stopped with much more reason this should be done with regard to a human being, who, for any circumstance, fails to heed the sound of the bell and the cries of alarm, and remains on the right-of-way. Simple prudence suggests that in such cases the detention of the car is the most secure way of avoiding the accident, and if the motorman does not do so the finding should be that he proceeded with gross imprudence, or, at least, with carelessness and culpable negligence, and in violation of the regulations on the subject of wheeled vehicles.

He, who by action or omission causes damage to another, due to fault or negligence, is obliged to repair the damage done so declares article 1644 of the Civil Code. Commenting on article 1902 of the Civil Code of Spain, which is identical with said article 1644, an author expresses himself as follows: "1. *Juridic foundation of this class of obligations.*—This article establishes the general rule in respect to the imposition of the obligations which arise from fault or negligence. These obligations arising from damage caused by a voluntary action or omission, although executed without criminal intention, and, therefore, he who voluntarily executes the acts, causing or producing the injury, or he who also voluntarily, is guilty of the omission that produced the injuries, is required in the first instance to respond to the charge or to the responsibilities of making reparation—"The provisions of this article define and determine with all clearness the special character of this class of obligations which, while in certain cases owe their origin to a fact, or a positive act, such as springs from quasi-contracts, differ, nevertheless, from them in that these result from a lawful and purely voluntary act carried to completion by him upon whom the obligation is imposed, while in those which we are

now treating their origin is due to an unlawful act or omission although nor penal, and, at times, involuntary and even personal to the one who must respond for them, and as we shall see further along there may be cases in which the acts or omissions that produced the damage are not caused by the persons subject to the obligation, who, for certain reasons, must respond for them because they are imputable to them in a certain manner notwithstanding the fact that they did not cause them.

But the rule established in this article only refers to the responsibility imposed upon the party obligated when the damage which must be repaired has been caused by his own personal acts or omissions, and the said rule rests precisely on the juridic principle that serves as the foundation for the theory of said obligation, which declares that he who causes a damage or injury must repair it.—"However, in order not to fall into error it should be borne in mind that the limits of the precept contained in the said article are much more reduced, inasmuch as the precept does not comprise all the damages that may result on account of fault or negligence."

"If we examine carefully the general theory of fault and negligence we observe, in effect, that in one or the other of said causes there are three kinds or three distinct species, that is to say: "1. That which represents a voluntary action or omission resulting in the noncompliance of an obligation previously constituted; "2. That which produces damage or injury without any previous obligation, and which originates from an unlawful act that has not the characteristics of a crime or minor offense (*delito o falta*); and, "3. That which has its origin in an act that constitutes a crime or minor offense, and produces a civil responsibility as an accessory to the criminal responsibility.

"The first of these three species of fault or negligence is accessory to a principal obligation, the noncompliance of which gives rise to the special theory relating to fault in matters of contract, and the study of this should be made upon the examination of each contract, especially, as we have done here, analyzing then the peculiar effect of said fault in each of them."

"The third of the species cited is accessory also, inasmuch as its existence can not be conceived without the crime or minor offense that produces it. That is to say, inasmuch as the civil responsibility and the obligation which proceeds from the fault can only subsist along with the criminal responsibility, it follows that these cases result as a consequence of a criminal responsibility, and, therefore, their examination and regulation belong to the penal laws.

"In consequence of all this it follows that the only specie of fault or omission or negligence that can or does belong to the present chapter, is the second class; that is to say, the one that produces damages or injuries without the existence of an anterior obligation, and without any contractual antecedent, and that has its origin in a culpable action or omission purely civil; that is to say, one, although unlawful, yet does not contain the element of a crime or minor offense because it is not penalized by law. And even within these limits it is necessary to restrict still further the terms or the subject matter of this article which only refers to the fault and negligence personal to the party obligated, and not to those that result from the act or omisions of persons distinct from him.

"The precept which we are examining is founded on a principle of unquestionable equity, and the rule therein established constitutes a maxim of universal jurisprudence, inasmuch as the fault can not prejudice anyone except its author, and no one should bear its con-

sequence who, against his will and without any cause on his part, is the victim of the fault or suffers the injuries resulting from it. Nevertheless, the juridic reasonings that justifies the rule has given rise to the distinct questions in its application, not only in our own tribunals, but in those of other nations as well whose codes sanction analagous legal provisions, as occurs in those of France, Belgium, and Chili.

"II. *Necessary requisite for the application of this precept and extension of the obligation imposed by it.* Among the questions more frequently arising and that have produced the greatest number of decisions in jurisprudence, regarding the application of this responsibility, we find those that relate to the determination of the damage or injury suffered and the demonstration of the existence of the fault or negligence on the part of the one causing it. These are the two indispensable factors necessary to give rise to the obligation now being examined by us, because without the damage or injury the responsibility, to which the factors relate, can not arise, and although the element of damage may exist it does not require a reparation unless fault or negligence on the part of someone who caused the injury.

"In respect to the determination of damages it is necessary that it be certain, and that it does not result from a compliance with an obligation, or from acts or omissions of the injured party himself; and in respect to the proof of the existence of the fault or negligence, mere indications or inadmissible presumptions are not sufficient proof to establish either of them; but they should be proven in such a manner that no doubt is left in regard to them, and of their correlation with the damage caused, because it is necessary that there should exist between them and the wrong produced the rela-

tion between cause and effect in order that they may constitute the basis of the doctrine.

"The sentences of the Supreme Court establishing this doctrine are numerous. For instance; in a suit instituted by the insurance company entitled 'La Unión y el Fénix' against the Marine Society, Ibarra y Compañía for indemnity for damages and injuries to various buildings and furniture, insured by said company, occasioned by a fire resulting from an explosion which occurred on the ship *'Cabo Michachaco,'* the Tribunal, in resolving the cassation interposed against the judgment which absolved the defendant society, declared definitely, by sentence of June 23, 1900, that the action to obtain reparation of the damage caused by the acts or omissions in which fault or negligence intervenes, requires necessarily the demonstration of one or the other of said causes, because they are the essential foundation of the said action, in accordance with articles 1089, 1093, 1902, 1903 of the Civil Code; and in consequence, it devolves upon the plaintiff to submit proof in conformity with the general principle, relating to proof of the obligation, established by article 1214; and the inadmissible indication that the responsibility should be presumed from the simple existence of the damage and that it devolved upon the defendant to exculpate himself, is not justified. Hence, in order that a suit may prosper in which reparation is demanded in conformity with the article which we are examining, it is indispensible to establish proof not only of the damages but of the fault or negligence that produced it as well.

"Said Tribunal in a sentence of November 13, 1901, declared also that article 1902 referred solely and exclusively to the damages caused by an act or omission not derived from the compliance of an obligation. By

sentence of the 7th of March, following, the doctrine, long recognized in the jurisprudence and expressed in article 1902 of the code, was announced, to the effect that fault or negligence is the source of an obligation when between the fault or negligence and the damage the relation of cause to effect exist, but if the wrong produced does not emanate from acts or omissions of a third party the latter is not obliged to make reparation, although *said acts or omissions are imprudent or unlawful*, and much less so when it appears that the damage had for its immediate cause the imprudence of the injured party himself.

"The same Tribunal in a sentence of December 4, 1903, declared anew that in order to properly determine, in a civil suit, a claim for damages and injuries occasioned not by the noncompliance of an obligation, but by an act or omission, constituting an offense or quasi offense (*delito o causidelito*), it is not sufficient to prove the existence of the damages and injury, but in addition it must be proven that they result from the fraud (*dolo*), fault or negligence of the person to whom they are imputated, and such responsibility does not exist, when, instead of acting with malice or fault that person confines himself to the exercise of a lawful right.

"By sentence of the 16th of said month of December, 1903, the necessity for proving the existence of the damages, the indemnification or reparation for which is demanded, was again announced, and it was then said that this was necessary as a fundamental condition to support the responsibility imposed by articles 1902 and 1903 of the code.

"Subsequently, by sentence of March 2, 1904, the said Tribunal declared that when he, who being the owner of a farm, permits this to deteriorate so that it prejudices the rights of a third party, and fails to correct the condition, or to employ adequate means to

avoid its consequence damaging to another, incurs in the responsibility prescribed in article 1902; and, consequently, when a company having a railroad concession takes over a railroad constructed by another company, and does not correct the vices in the construction of the same and thereby causes damage to the property of a third party, it is obliged to indemnify the said damages, and the company will not be permitted to excuse itself by saying that the works were constructed by another enterprise, because the former, that is the succeeding company, was the one who should at that moment remedy the defects.

"The necessity for proof on the part of the plaintiff of the damages and injuries caused was reaffirmed in a sentence of June 7, 1905, in which the doctrine was announced that while he who causes damage to another by his own acts, or the acts of persons for whom he should respond, when fault or negligence intervened, is obliged to repair the damage and pay indemnity for the injuries caused, it is indispensable to prove damages in order to estimate the claim; and if the Tribunal in view of the proof presented and appreciated, as a whole and separately, declares that the plaintiff has not established the real existence of the damages it necessarily follows that the judgment denying the right to indemnity demanded does not infringe the said article 1902.

"And finally, on the 16th of the said month of June, the same Tribunal again declared that the obligation to repair the damage caused, imposed by the said article, proceeds solely when the damage is the necessary consequence of the act or omission in which fault or negligence has intervened, and not when the damage is solely imputable to the one who suffered it in his person or in his property.

"From what has been stated in the sentences which we have cited we may deduce, as a conclusion, that in

order to give rise to an obligation imposed by the article of which we are now treating, the concurrence of two distinct requisites is necessary; that is to say: 1. That a damage or injury exists which does not result from acts or omissions of the injured party himself, and the existence of which must be duly proven by the one who demands reparation; and 2. That said damages and injuries have been caused by fault or negligence of some person other than the one who suffers the damage.

"The obligation imposed by this article embraces the two particulars or the two terms properly belonging to all indemnification in accordance with article 1106 of the same code. That is to say, the value of the loss suffered and that of the profit or income ceased to be obtained. It has been so resolved by the Tribunals, so often referred to, by sentence of January 15, 1902.

"However, although the proof of the existence of the damage or injury is necessary, in order that it may produce the obligation of indemnification, this may be left to the period of the execution of the sentence for the determination of its amount and extent, and it has so been declared by said Tribunal on the 7th of February, 1905, as we shall see further on." (Comentarios del Cógido Civil español, por don José María Manresa y Navarro, Tomo 12, páginas 599 a 605.)" (Translation: Commentaries of the Spanish Civil Code by don Jose Maria Manresa y Navarro, Volume 12, pp. 599 to 605.)

It has been proven fully in this proceeding, that a wrong exists, and that it did not result from the acts of the injured party Masa, and that said damage was caused by the fault or negligence of the motorman Gómez, and not the deceased Masa Orozco. These proofs established the conclusion that Gómez is personally responsible for the damage caused to Masa and

that he is obligated to repair it, and to pay indemnity for the consequent injuries.

But the suit has not been instituted against Gómez but against the Tramway Company of which he was an employee, and which is being charged with the responsibility in conformity with article 1645 of the Panamanian Civil Code which reads as follows: "The obligation imposed by the anterior article is not only demandable for the acts or omissions of one's self, but for those of the persons for whom one is responsible as well. The father, and in case of his death or incapacity, the mother, is responsible for the injuries caused by their minor children, who live in their company. Tutors are responsible for the damages caused by the minors or incapacitated who are under his authority, and dwell in his company."

"*The owners and directors of establishments or enterprises are equally liable in respect to the injuries caused by their dependents* (dependientes) *in the branch of the service in which they may be employed, and within the scope of their employment.*

"The State is responsible in this connection when it acts through a special agent, but not when the damage has been caused by an official to whom the performing of the act in question properly belongs, in which case the provisions of the preceding article shall be applicable.

"And finally, masters or directors of arts and crafts are responsible in respect to the injuries caused by their pupils or apprentices so long as they remain under their custody.

"The responsibility treated of in this article shall cease when the persons therein mentioned prove that they have employed all of the diligence of a good father of family to prevent the damage."

Taking up the affirmation that the defendant company is responsible for the damage caused by its employee, Gómez, the attorney for the said company says: "Therefore, even if we suppose that the provisions of the said Title XVI, Book IV of the Civil Code are applicable to the case under discussion it would be necessary in order for the company to be responsible that it be shown that the company had employed an incompetent and careless man; because the law, in no case, makes any one responsible for the acts which he could not have foreseen. José Gómez has been employed for many years by the company, and if his competency had not been fully established, as it is, the fact alone of his permanency in the employ would demonstrate his competency, because otherwise the company would have been obliged to discharge him from the service. The fact that the cars are in good condition is not contradicted by the other side, and they could not contradict it because the inspector of vehicles is legally required to examine the cars, and he does not consent that they be used if they do not afford the sufficient guarantee." The attorney for the plaintiff on this point says "In the opinion of Doctor Arias it would seem to be sufficient if the company has provided the cars of the tramway with brakes and (reverse lever), because by doing so the company employs all of the diligence of a good father of family.

"But it seems to me, and I am sure that your honors will concur in my opinion, that that is not the way in which the said duty can be complied with. If that was so, the cars might travel alone, or they might be handled by inexperienced persons without any knowledge respecting the obligations connected with the position, and that is inadmissible. Speaking generally on the theory it might be found also that it is sufficient for owners of automobiles to maintain their cars in a good serviceable

condition with brakes, etc., and that they would never incur in a responsibility for the damages done by the persons charged with their operation when culpable negligence has intervened."

Now that this very important question has been touched upon it is proper to make a comparative study of the matter based on the Civil Code of Colombia, and on the one now in force which was taken in part from the Civil Code of Spain.

Article 2349 of the Colombian Civil Code provides that masters shall be responsible for the damage caused by their domestics or servants, on the occasion of a service rendered by the latter to the former; but they shall not be responsible if it be proved or appear that on such occasion the domestics or servants conducted themselves in an improper manner, which the masters had no means to foresee or prevent by the employment of ordinary care and competent authority; in such case all responsibility for the damage shall fall upon said domestics or servants.

The civil sanction which the quoted article establishes against the masters or patrons is based on the concept that they have the free election of their domestics or servants, and if they employ one who is careless or negligent, of bad habits, or disqualified for the work given him, they must bear the responsibility of the damages occasioned by his bad qualities or incapacity. Therefore, if it should be proven that the master did not have the free absolute election of his servant, but simply a relative one, as occurs in those callings which have been placed under regulations by the competent authorities, then the civil responsibility of the master ceases, because in exercising his choice of a servant he reposes confidence in the administrative authority, who authorizes the individual to follow the calling in question. That occurs in respect to the conductors of

automobiles commonly called "chauffeurs." The Government of Panama and that of the Canal Zone have established regulations for the exercise of the calling of the chauffeurs in such a manner that no one who has not been previously authorized may lawfully perform such duties. And so the owner of an automobile who is in need of a chauffeur requires of the latter, before everything else, that he produce a certificate of his qualification, or *license*, as it is commonly called. When the interested party produces those documents, corresponding to the Canal Zone and the City of Panama the owner of the car then rests in the security that the person who has been authorized, by the competent authorities, to operate automobiles is a person qualified to do so, and that without any fear he may trust his life, that of his family, and that of the pedestrians to the hands of this expert who has merited from the examining boards of the Canal Zone and the District of Panama these testimonials to his ability and to the fact that he is entitled to the confidence that may be reposed in him. Because it should be borne in mind that in addition to the technique and practical knowledge that is required by the said boards, before a license is issued, the applicant is also required to present certificates from two persons who know him to the effect that he has observed good conduct, and that he has no degrading vices.

In the same manner that society reposes confidence in the physician and the pharmacist, authorized by competent authorities to exercise their professions, that they are persons qualified, and that the lives of dear ones may be trusted to them, so that same society has full confidence that the authorities will not issue certificates of competency to disqualified individuals to operate automobiles; and, in consequence, those who possess the certificates may guarantee, without any room for doubt, the proper exercise of so delicate and

dangerous a calling. When this calling is once placed under regulations it is the authorities that issue the certificate of qualification that should respond for any deficiency in the chauffeur, and, therefore, that same authority is disqualified to demand of the proprietor of the car that he pay damages occasioned by a person whom that authority has authorized to operate automobiles.

If the calling were not regulated, and the owner of the automobile could choose freely a servant to operate it, then the civil responsibility for damages caused by the incapacity of the servant would fall upon the owner, because in that case the owner would take the place of the board of examiners of chauffeurs, and he would have to investigate fully the competency of the applicant before admitting him into his service.

But taking conditions as we find them the most that the master must do, and this he does to protect his own interest, is to ascertain the previous conduct of the individual; whether he has served in other places and what has been his deportment; whether he is addicted to drink or not; whether he is honorable, of a calm or violent temperament, and whether he has not had accidents of a serious nature. When the master has done all these things it can be said that he has complied with his duty, and that he has employed all the prudence necessary in order to avoid any accident that might result in damage to a third party; in other words, that he has employed the care of a good father of family, which is what is required by article 2349 of the Civil Code when it speaks of the ordinary care and the competent authority.

There is another case in which a master, probably, would be responsible for the damage done by his chauffeur, and that is, if the car travels at a greater rate of speed than that permitted by the police rules

without the master requiring the chauffeur to moderate the speed; but if to the contrary the automobile was going at a speed less than that permitted when the accident occurred, it is clear that the owner is absolutely without responsibility, because he could not foresee or impede the accident by employing ordinary care and competent authority, and he could not anticipate that the servant would behave under such circumstances in an improper manner, due to the want of the necessary calmness or to inexperience which the Board of Examiners and the competent authorities had attributed to him, and in respect to which the master relied upon him.

The principle announced in article 2349 is the same as that established in article 2347, when it says that every person is responsible not only for his own actions, for the purpose of indemnifying the injured, but for the acts of those who are under his care as well. And so the father, and in absence of the father, the mother is responsible for the acts of his minor children who inhabit the same house with him. And so the tutor or the curator is responsible for the conduct of the ward who lives under his care and dependency. And so the husband is responsible for the conduct of a wife. And so the directors of colleges and schools respond for the acts of their pupils while under their care, and the artisans and empresarios for the acts of their apprentices and their dependents (dependientes) in the same case.

But the responsibility of such persons shall cease if with the authority and care which their respective quality confers upon them and prescribes they should not have been able to prevent the act.

In all of these cases the person charged with the care of another responds for the culpable and injurious acts of the other provided that he might have prevented the damages and did not do so; but if notwithstanding he

has employed the indispensable prudence and care of a good father of family the damage nevertheless is produced, then his responsibility terminates, because it would not be just nor equitable to demand from a person more than he can give within human effort. All legal responsibility has its limit at the point where the unforeseen or inevitable begins.

In the notes of Señor Bello, on the Civil Code of Chili, we find the following: "For example, a coach collides with a person or breaks a window or door, due to the malice or negligence of the coachman. The master could have foreseen the damages that might be caused by a vicious inexperienced coachman, but if a coachman of habitual good conduct should become intoxicated upon one occasion and in that state runs against a pedestrian or insults him, the master not being present, or being present is disobeyed, what can be imputed to the latter?"

Of course, when Señor Bello wrote the Civil Code of Chili automobiles did not exist, and the calling of coachment, or chauffeur, was not then regulated by the police authorities. Nevertheless, accommodating himself to the provisions to be found in the majority of the legislations of civilized countries he limited the responsibility of the master to the case in which he had selected for his servant a person disqualified or of bad conduct, as he well explains it. That being so, it is evident that if the public authorities say to the master, through the medium of a certificate of qualification and good conduct, that he may trust his automobile to Pedro, who has been previously examined and who has given proof before the competent authorities, of his good conduct, the master is not responsible for the damages caused by Pedro because it is presumed that the election that he made was correct, and that he could not foresee that the

qualifications of Pedro would fail on a given occasion, and cause damage to a third person.

An author, who commentated on the precept of the Spanish Civil Code, which is analogous to Article 2349 of our own, announces the following very well considered principles: "Our code has not followed the Italian school, but has been inspired rather in the criterion of the French doctrine inasmuch as it imposes the obligation to repair the damage caused in virtue of a presumption, *juris tantum*, of fault on the part of the person who has under his authority or dependency the one who caused the damage, derived from the fact that he had not employed due care and diligence over the acts of his subordinates to prevent said result. And so it is that, in accordance with the last paragraph of article 1903, said responsibility ceases when it is proven that those who are responsible for the acts of others have employed all the diligence of a good father of family. Therefore the representation is not the cause of the obligation, nor is the interest, nor the necessity that there should be someone responsible for the damage caused by one who was irresponsible and without guarantees of solvency to repair the damage done himself, but it is the compliance, tacit or supposed, with the duties of precaution and prudence imposed by civil ties that unite the obligated party with the persons on whose account he should repair the damage done. For that reason it, the Code, places the obligation among those that come from fault or negligence."

It is, therefore, seen that the criterion of the Spanish Code, as well as that of the Colombian Code, is the one which condemns the want of care of the master in selecting the servant or dependent, or his negligence in not properly overseeing him; but the responsibility of the master disappears if the public authority assumes the duty of choosing the persons competent for certain

callings, and says to the owners of automobiles, for example, that they can not turn over their cars except to those who have certificates of qualification or authorization for the management of those modern vehicles.

The new Civil Code of Panama, approved by the Assembly in 1916, establishes the same principle as that contained in the Spanish Code in its article 1903; and it may be observed that this latter article, as well as the Panamanian article, does not impose on the masters or patrons in general the obligation to pay the damages caused by their domestics or servants as was done in the Colombian Code, and that it limits that responsibility to the owners and directors of an establishment or enterprise in respect to the damages caused by their dependents. And this is so because "it is much more equitable and just that the said responsibility should fall upon the principal or director who could select another dependent, careful and prudent, and not on the injured party, who did not have such a selection, and if the latter utilized the service of the dependent it was solely because of the confidence inspired in him by the said principal or director."

It may not be amiss to add another concept of the above-mentioned commentator on the Civil Code of Spain relative to the responsibility of the owners or directors of enterprises for the damages occasioned by their dependents. He said: "For the same reason he who, on account of his work, profession, or other circumstances, has some other person in his service, or under his dependency or custody (as occurs to owners or directors of an establishment or enterprise in respect to their dependents, and to masters and directors of arts and crafts in relation to their pupils and apprentices) they should require from such person that he discharge his duties with all of the activity and diligence necessary; and if, on account of the person's failure to so discharge

his duties, damages should result, then those who have such persons in their service or under their care should be obliged to indemnify the injured party. Now because he has not shown a proper zeal in the supervision of the acts of his dependents or subordinates, now because the dependents or subordinates, as a general rule, are lacking in the means to make indemnification, it is not just that he who suffers damage on account of another should be deprived of an adequate remedy to demand reparation; the reason of this, though, seemingly hard, is indisputably just, especially in respect to damages caused by the dependents in the various branches of service in which they are employed, and within the scope of their employment."

The Tramway Company of Panama chooses freely all of its employees who render service on the cars, and it is the same company who tries out the employees and declares them qualified for each one of the services required in the management of the vehicles. The authorities have no intervention whatever in the designation or appointment of the employees, nor in their selection nor in the determination of their qualification. Hence, if any one of its employees or dependents turns out to be negligent or careless, and by reason of his fault damage is done to a third party the enterprise is responsible for such damage, because it had full opportunity to select another dependent more careful and diligent. In all of the civilized countries of the world the laws and jurisprudence are especially strict in respect to damages caused by tramways and railroads, bearing in mind the imperative necessity which exists for the services of such means of locomotion, and the impossibility on the part of the passengers to ascertain the qualifications and personal conditions of each one of the employees who serve them. It is necessary to depend on the good faith, care, and diligence of the directors of the respective

enterprises, and only they can save the lives of the pedestrians and passengers from frequent catastrophies.

To sum up, the Court finds that the electric tramway enterprise is civily responsible for the damage caused by the motorman, José Gómez, to Eliseo Masa Orozco, without prejudice to the right of the company to proceed against the same Gómez to recover the sum that the company may have to pay by way of indemnification for the damage done.

In respect to the appraisal of the damages, the expert Ernesto de la Guardia estimated them at 3,600 balboas; the expert Jorge L. Paredes at 1,200 balboas; Claudio Z. Harrison at 1,000 balboas; Rodolfo Castro at 1,200 balboas; Julio Quijano at 3,000 balboas; J. D. Arosemena at 5,000 balboas, including moral damage, and in 2,500 balboas the material damages alone; Eduardo F. de la Guardia at 1,275 balboas; and Enrique de la Ossa at 1,031 balboas the material damages, and in the same sum the moral damages.

The experts, Paredes and Castro, are employees of the defendant enterprise, and the expert, Harrison, is an employee of the attorneys for the enterprise, and, consequently, their findings are lacking in the independence indispensable in such cases.

In view of the diversity of the opinions among the experts, and of the fact, that, in accordance with article 854 of the Judicial Code, the findings of the experts are not of themselves full proof, and that such proof must be appreciated by the Tribunal in rendering final judgment, and taking into consideration the reasons on which the findings of the experts are based, and of the other proofs that appear in the record, the court assesses the indemnity for the injury at the sum of 2,000 balboas, material damages, and in doing this the court has taken into consideration Masa's age (30 years), the age of his mother (50 years), the circumstances that

he was a good son, who divided his salary with his mother, with his children, and with his concubine who lived together in community, that he earned on an average of 30 balboas per month, and that of this he could give his mother 15 balboas per month. Calculating that Emilia Orozco might live eleven or twelve years more the material damage that she suffered from the loss of her son should be estimated in the sum already expressed, inasmuch as there is no other more scientific basis for its ascertainment.

In the complaint nothing is said of injuries on account of moral damages, and in none of the material allegations of the action are moral damages considered. If the plaintiff had desired to submit that question she should have done so in due form, that is to say, state clearly in what amount she estimated the damages for the material injury and in what amount the moral injury.

However, as the attorney for the plaintiff in his argument upon the second instance has insisted upon reparation for the moral damage suffered by the plaintiff, the court has examined the point, and has reached the conclusion that neither the legislation in force up to the 30th of September, 1917, nor that in force at the present time, authorizes the inclusion of the moral damage in the appraisal of the injuries, and also that there is no existing jurisprudence, establishing such a doctrine in the Tribunals of Colombia, nor in those of Spain from whence the civil and penal codes now in force were derived.

The costs were taxed in the first instance in 300 balboas; that is to say, 10 per cent of 3,000 balboas, the amount of the judgment; but inasmuch as in this instance the damages were reduced to 2,000 balboas the corresponding reduction should be made.

In view of the foregoing considerations the Supreme Court, administering justice in the name of the Republic and by authority of law, reforms the sentence brought here for review in the sense of reducing to 2,000 balboas the amount of the damages that the Panama Electric Company shall pay to Emilia Orozco, as well as the costs in the first instance, which are assessed at 200 balboas which the work is lawfully worth. There is no condemnation of costs in this instance.

Let this be notified, copied, and returned.

(Signed) JUAN LOMBARDI,
(Signed) SAMUEL QUINTERO,
(Signed) E. URRUTIA DIAZ,
(Signed) MANUEL A. HERRARA L.,
The Associate Judge.
(Signed) H. F. ALFARO.
The Secretary, (Signed) M. A. GRIMALDO B.

This is a copy, Panama, October 19, 1918.

(Signed) F. GUARDIA, C.,
Secretary of the First Juzgado of the Circuit.

[SEAL]

MR 64853-13

Supreme Court of the United States,

OCTOBER TERM, 1918.

No. 203

PANAMA RAILROAD COMPANY,
Plaintiff in Error,

versus

THEODORE BOSSE,
Defendant in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR DEFENDANT IN ERROR.

THEODORE C. HINCKLEY OF
HINCKLEY & GANSON AND
JOSEPH W. BAILEY,
Attorneys for Defendant in Error.

The Evening Post Job Printing Office, Inc., 156 Fulton St., N. Y.

CONTENTS.

INDEX TO AUTHORITIES.

Supreme Court of the United States,

OCTOBER TERM, 1918.

No

PANAMA RAILROAD COMPANY,
Plaintiff-in-Error,

versus

THEODORE BOSSE,
Defendant-in-Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR DEFENDANT-IN-ERROR.

For the reason that the statement of the case appearing in the brief and argument of plaintiff-in-error is so incoherent and rambling that it is a matter of difficulty to understand what same is really about, we desire to preface this brief with a separate statement.

The plaintiff-in-error, a corporation, organized under the laws of the State of New York, was operating a line of motor busses between the town of Balboa and the City

of Panama in the month of July, 1916, and on the afternoon of the 3rd day of that month, one of its motor busses while being driven by the chauffeur in charge, an employe of the plaintiff-in-error, at a rate of speed in excess of twenty miles per hour on a public highway in the town of Balboa, without warning, struck defendant-in-error, and knocked him down, the wheels of same passing over him, crushing his right foot and breaking the bones thereof, causing him such severe injury that he was forthwith removed to Ancon Hospital for treatment. Defendant-in-error was struck by the motor bus on a public highway which at the time was filled with pedestrians, including many women and children. There were no sidewalks on either side of the road.

The following portions of an Executive Order promulgated by the President of the United States under date of February 28, 1912, should be considered in deciding this cause:

> By virtue of the authority vested in me, I hereby establish the following order for the Canal Zone:
>
> SECTION 1. No automobile, motor cycle, or bicycle shall be driven or operated over the road or streets of the Canal Zone at a speed exceeding fifteen miles (15) an hour on straight roads, or at a speed exceeding eight (8) miles an hour when approaching or traversing curves, forms, or cross-roads, or when traveling over the streets of any city, town, or village of the Canal Zone. The owner of an automobile, if within the car, shall be held responsible for its speed; in the absence of the owner, the person actually driving the automobile shall be held responsible. The person operating a motor cycle or bicycle shall be held responsible for its speed.
>
> SECTION 2. In the operation or employment of automobiles, motor cycles, bicycles, carriages, wagons, and other vehicles over Canal Zone roads or streets, the following rules shall be observed,

> viz: All such vehicles, in meeting and passing other vehicles, or in overtaking and passing other vehicles they shall keep to the right. The owner of an automobile or other vehicle, if riding therein, shall be held responsible for the driving or operation thereof, agreeably to the provisions of this section; in the absence of the owner, the person driving or operating such vehicle shall be held responsible. In the case of any motor cycle or bicycle, the person operating same shall be held responsible. * * *

This law had not been repealed and was still in force and effect during the entire month of July, 1916. Defendant-in-error remained in Ancon Hospital from the 3rd day of July, 1916, to the 30th day of that month. As a result of the injuries sustained, he endured extreme pain and suffering, and the second toe of his right foot was amputated while he was in the hospital.

The legal issues as raised by plaintiff-in-error in this case have on three different occasions been decided by five Federal judges, and the Judge of the United States District Court of the Canal Zone, adversely to the contentions as raised by counsel for appellant. This without a dissenting expression.

Panama R. Co. vs. *Bosse,* 239 Fed. 303;
Panama R. Co. vs. *Toppin,* 250 Fed. 989.

Reply to Appellant's Preliminary Statement.

It is rather amusing that counsel for plaintiff-in-error should tender to this Court "some suggestions of a general character relative to the laws of the Canal Zone", which he would try to make believe are applicable and all important in deciding the instant case. However, as these suggestions (pp. 6-14, Appellant's Brief) deal

largely with an historical résumé of the Canal Zone, events with which every member of this Court is familiar, and have absolutely no bearing whatsoever on this case, a cursory reply to same becomes necessary.

It is a fact that the President in 1904 addressed two letters to the Secretary of War of considerable interest to the inhabitants of the Zone, but it is rather drawing on one's imagination to try to make believe that same had the force and effect as law. It is also true that in 1904, a Penal Code and Code of Criminal Procedure were enacted to become law there; rules of Court were from time to time adopted, and in 1907 a modern Code of Civil Procedure was adopted, not to mention hundreds of Executive Orders and Acts of Congress that were from time to time passed affecting the rights of individuals in the Canal Zone. All of these laws were strictly American in character, and the right of trial by jury is now enjoyed there before a Federal court created by an Act of Congress. It is also a fact that the plaintiff in this case is an American Citizen and the defendant an American Corporation.

In 1912, the President by law ordered a depopulation of the entire Canal Zone, and immediately thereafter expropriated all privately owned land, or interest in same in the Zone, thereby making it a Government reservation. At present but few other than those employed by the Government or the Railroad Company are allowed to live there, and all lands or any interest in same are now owned by the Government of the United States or the Panama Railway Company. The population is that of an American Colony consisting of soldiers, sailors and Civilian employees, not one per cent. of whom are Panamanian. It can truly be said the Zone has become Americanized in every respect, especially in its laws and customs, and in no manner should be compared to an Insular possession like the Philippines.

Counsel for plaintiff-in-error would further try to have this Court believe that until May, 1910, the instructions issued by the President were strictly adhered to, and that when the Supreme Court there, in 1910, decided the case of *Kung Chin Chong* vs. *Wing Chong* (p. 15, Brief of Plaintiff-in-Error), the judiciary thereupon started on the downward path and has not since legally righted itself. From a reading of this case as well as that of *Fitzpatrick* vs. *The Panama R. Co.,* cited by appellant (p. 19, Brief of Plaintiff-in-Error), it can plainly be seen that counsel for appellant is mistaken.

It may also truly be said that if one is to apply "The laws of the land with which the inhabitants are familiar", he must not only literally, but strictly, apply the rules of American or common law, as practically all of the inhabitants there now and for several years past have been American, and are entirely guided by American customs and law.

In support of his theory that the laws of the Canal Zone should continue in force until altered or amended by competent authority, plaintiff-in-error, on page 15 of his brief cites the case of *Holden* vs. *Hardy,* 169 U. S. Reports, pp. 366-398, as declaratory of a well recognized principle of International Law.

This was a case in error to the Supreme Court of Utah to review certain judgments of that Court denying an application for discharge upon two writs of *habeas corpus* of one convicted of a misdemeanor for violation of the Utah law regulating hours of employment in underground mines. The syllabus of the case is to the effect that the right of contract may be limited by the state police power—protection of health and morals—state statute limiting hours of labor in mines and making its violation a misdemeanor, is valid. Manifestly this case is not in point.

Reply to Assignments of Error One and Two.

The Doctrine of Respondeat Superior Does Apply in the Canal Zone.

As plaintiff-in-error's second assignment is embodied in the first, they shall be discussed accordingly, or in so far as this brief is concerned as one. In the first assignment, plaintiff-in-error says that the Court of Appeals erred in affirming the judgment of the trial court in overruling the demurrer to the amended complaint in that it thereby held that the liability of the plaintiff-in-error was to be determined in accordance with the common law rules with respect to liability of corporations for the acts of their agents, instead of by rules of the Civil law. In other words, counsel for appellant contends that the doctrine of *respondeat superior* does not apply there, his contention being that such a doctrine is unknown to the Civil law.

Objection having been raised by plaintiff-in-error that the Circuit Court of Appeals erred in affirming the judgment of the trial court in overruling the demurrer to the amended complaint, let us first consider what this pleading contained. It merely alleged that the complaint did not state facts sufficient to constitute a cause of action and that the defendant especially demurred to all that part of the complaint wherein mental and physical pain and suffering was set up as an element of damages (p. 4 of the Record).

Plaintiff-in-error then goes on to state that in overruling the demurrer, the Court "thereby held that the liability of plaintiff-in-error was to be determined in accordance with rules of common law respecting liability of corporations for the acts of their agents, instead of by rules of the Civil law, which he claims were then in force and effect in the Canal Zone".

Page eight of the record shows that the trial court overruled this pleading without one word being said as to why or by virtue of what law such action was taken. It is therefore unfair to assume that the trial Court applied any particular law in this respect. Neither did the Circuit Court of Appeals in passing upon this question make any allusion as to what law was to govern with respect to this phase of the case. That Court merely stated as follows:

> "To this complaint, the defendant below interposed a demurrer on the ground that the same does not state facts sufficient to constitute a cause of action and especially to all that part of plaintiff's complaint wherein mental and physical pain and suffering are set up as an element of damages. * * *
>
> "On consideration of the record, we conclude that the demurrer to the complaint was properly overruled" (p. 39 of the Record).

It is therefore not fair to assume that the Circuit Court of Appeals did other than confine itself to the record in this respect.

A reading of the complaint and amended complaint (pp. 2-6 of the Record), will conclusively demonstrate that the complaint and amended complaint were not demurrable.

However, for the sake of argument, let us assume that the Civil law should prevail in this case, and under such circumstances are the first two assignments of error tenable. We are therefore met with the proposition as to whether or not there was any law in force and effect within the Canal Zone at the time this suit was instituted, civil or common, upon which defendant-in-error had a right to recover in a tort action against a corporation for personal injuries caused by the negligence of an employe of a corporation acting within the scope of his

authority. That is, does the doctrine of *respondeat superior* apply in the Canal Zone.

Before entering into a discussion of this last mentioned subject, we first wish to call the court's attention to a misstatement of fact appearing on pages 24 and 25 of plaintiff-in-error's brief wherein it is announced that defendant-in-error relied on an Executive Order of the President with reference to speed of automobiles in the Canal Zone in order to recover damages. This is not a fact, but an allegation was made in the complaint as to the chauffeur of the bus running same at an excessive rate of speed for the purpose of requesting the trial court to charge the jury in this respect in order to establish that there had been negligence *per se*. This that court refused to do. Plaintiff-in-error well knew that the suit was brought against it for the negligent driving of its chauffeur, and that the Executive Order referred to on page two of this brief was not the only law relied upon by the plaintiff in the trial court in support of his claim. A reading of the complaint and amended complaint (pp. 2-6 of the Record) will show this to be a fact.

The Circuit Court of Appeals in passing upon the doctrine of *respondeat superior* as applicable to the instant case (*Panama R. Co.* v. *Bosse,* 239 Fed. 303; l. c. 305) states:

> "The main contention on that ground is that the Railroad Company was not responsible for the acts of negligence of its employee resulting in injury to others.
>
> "Corporations act only through agents and every act of an authorized agent within the scope of his employment is therefore an act of the Company."

Later, the Circuit Court of Appeals in the case of *Panama R. Co.* vs. *Toppin,* 250 Fed. 989, had occasion to again consider this subject. In that case, the Court in

sustaining the doctrine of *respondeat superior* as existing in the Canal Zone states:

> "There was evidence tending to prove that the plaintiff was injured as alleged. The existence of the quoted laws of Panama was not denied by the defendant, but it was contended in its behalf that a request for a directed verdict in its favor should have been given, on the ground that neither of those laws, as it was authoritatively interpreted and enforced in Panama, had the effect of making a railroad company answerable for the negligence or misconduct of its employes while acting within the scope of their employment; and that the doctrine of *respondeat superior* is not part of the law of Panama. We are not of opinion that the evidence which was adduced as to the laws of Panama supports this contention. On the contrary, we think the evidence is such that it well supports a finding that the quoted statute of 1887, as it has been authoritatively interpreted in Colombia while Panama was a part of that country, has the effect of making railroad companies responsible for personal injuries caused by the want of care or negligence of their employes while engaged in the service they were employed to render."

Articles 640, 2341, and 2347 of the Civil Code of the Canal Zone provide as follows:

> "Art. 640. The acts of the representative of the corporation, in so far as they do not exceed the authority conferred upon him, are the acts of the corporation: when they exceed such authority, they bind the representative personally only."

> "Art. 2341. He who has committed an offense or fault resulting in injury to another is obliged to indemnify him, without prejudice to the principal penalty that the law may impose for the fault or offense committed.

> "Art. 2347. Every person is responsible, not only for his own actions, for the purpose of indemnifying the injury, but for the acts of those that are under his charge as well."

The first section above quoted seems to very plainly express the law in this respect. The manner in which the chauffeur operated the bus may have been careful or negligent, and if in the latter manner, there exists no doubt as to the liability of the corporation, which must respond in damages.

As Louisiana is about the only state in the Union whose jurisprudence is founded on the doctrines of civil law, we must naturally look to some of the decisions of the Supreme Court of that state as our guide. The Civil Code of that state also has certain provisions which are almost identical with those just quoted. That Court, in passing on this subject says:

> "But if the corporation, acting only through agents, is to be exempted from liability for its agents' acts on the theory that some preventative power must be shown, beyond the selection of the incompetent agent, it would follow that no corporation could be made liable. The theory, in other words, would seem to exempt corporations from the responsibility for the neglect and imprudence of their servants imposed by the law on all masters."
>
> *Nelson* vs. *Crescent City R. Co.*, 49 La. Ann. 491.

In support of his attempt to convince this court that the doctrine of *respondeat superior* does not apply within the Canal Zone counsel for appellant (pp. 25, 26, Plaintiff-in-Error's Brief) cites the remarkable case of *Filipe Ramirez* vs. *The Panama R. Co.*, a translation of the decision of the Supreme Court of Colombia being set forth in full in his brief. This case was decided by the Supreme Court of Colombia more than thirty years ago.

The opinion shows that the plaintiff attempted to steal a ride on a passenger train of the Panama Railroad Company. For some reason which does not appear in the record, one C. Smith, who was employed "to casually lend services" as conductor of the company, became engaged in an altercation with Ramirez in the course of which a fight ensued between these two individuals and Smith threw Ramirez off the train. As a result of the injuries received in this fight with Smith, Ramirez became permanently disabled. The Court held that Smith was guilty of a crime and that his acts were not in the course of his employment; that the suit was untimely and that it could not be instituted against Smith until he had been convicted and the defendant company was absolved from liability. We respectfully submit that the decision of the Court does not differ materially from the doctrine as laid down by all the Courts of last resort in the United States. In other words, if an employe of a company while acting outside the scope of his employment injures any person, his employer is not liable in damages for such act. But such was not a fact in the instant case.

Appellant next (pp. 30, 31, Plaintiff-in-Error's Brief) in support of this contention, cites the case of *Johnson* vs. *David,* 5 Philippine Reports, 663, in which the Supreme Court there held that the owner of a coach who was not riding in same, was not liable for any damages by one who is injured by the negligent driving of the coachman. As will later appear, the civil law with reference to the liability of empressarios and of private individuals in tort actions is not identical, although the weight of authority as indicated by the opinions of courts of last resort in countries wherein the civil law prevails is contrary to this decision of the Supreme Court of the Philippines.

Appellant next (p. 35, Plaintiff-in-Error's Brief)

cites the following from the case of *Strawbridge* vs. *Turner & Woodruff,* 8 Louisiana Reports, 538:

> "This restriction to the liability of masters and principals was an unfortunate and unadvised departure from the Napoleonic Code, from which most of the enactments of our laws on this subject have been taken almost verbatim. In that work, the restriction which exists in favor of fathers, teachers, etc., does not extend to masters or principals. The reason given for this distinction is, that servants and agents, when in the discharge of their duties, are supposed to be acting under the authority of their masters and principals; and that the latter should be attentive to employ none but good servants and agents, while the restricted liability of fathers, teachers, etc., has only for its object to secure from them a proper degree of watchfulness over the conduct of the persons entrusted to their care."

It is indeed strange appellant should cite such law in support of his contention as to the doctrine of *respondeat superior.*

Kirkbridge, the chauffeur and agent of plaintiff-in-error, naturally admitted that he was a past master in his art, and was running his bus without a speedometer (pp. 23-24 of Record), but the record does not disclose anything with reference to the diligence used by the company in selecting him; furnishing him proper appliances to work with, nor that he was acting with due care at the time of the accident, all of which facts should have been shown by affirmative proof introduced by counsel for plaintiff-in-error at the time of trial.

Why appellant should cite at length an ordinance relative to the licensing of chauffeurs in the Canal Zone in support of any issue raised by the record in this case we are at a loss to understand. This ordinance was not introduced in evidence at the time of the trial and forms

no part of the record (pp. 36-37, Plaintiff-in-Error's Brief).

The cases and argument as advanced by appellant (pp. 38-50, Plaintiff-in-Error's Brief) are too puerile to warrant serious consideration. Appellant would try to have this Court believe that if the Railroad Company by virtue of its charter had no right to operate buses as an adjunct to its business, it would then *per se* not be responsible for any injuries resulting from same (pp. 46, 47, 48, 49, Plaintiff-in-Error's Brief), that is, that such acts were *ultra vires*. The reasoning advanced by appellant in his brief on this subject semes to be in keeping with the rest of his absurd appeal to this court. Counsel for appellant should know better than to tell this Court (p. 46, Plaintiff-in-Error's Brief), that the operation of the bus in question by the Railroad Company had no connection with the railroad proper, nor that the Railroad Company did not have the right under its charter to operate same. This point being immaterial to the issues raised by the record in the instant case, requires no further comment.

On page fifty of plaintiff-in-error's brief, reference is made to the fact that defendant-in-error also relied on a decision of the Supreme Court of Bogota, rendered in the case of *Cancino* vs. *The Railroad of the North* in December, 1897. This is a misstatement of fact as the defendant-in-error never relied on this case in support of any of his contentions and would not have the effrontery to burden this or any other court with such an absurd citation of law. It is, however, a fact that the plaintiff-in-error in his brief here as well as in the Circuit Court of Appeals, relied upon this case in support of his theory opposing the doctrine of *respondeat superior*.

This was a suit brought by the plaintiff, Mrs. Jaramillo de Cancino, against one Manuel Davila, the concessionaire of a railroad, for damages resulting from the burning of plaintiff's house by reason of the escaping of

sparks from the smokestack of a locomotive which belonged to the defendant. The Court held that the defendant was liable, and condemned it to pay a trifle over four thousand pesos, the estimated value of the house and furniture therein. In that case it was proven, among other things, that the engineer, Tomas Pinzon, was "A good employe, a skillful engineer, prudent, of good disposition, gentle and careful in the discharge of his duties", and that Juan Manuel Davila, the defendant, "Was scrupulous and exacting as to the selection of employees for the enterprise." In other words, in the *Jaramillo* case, the defendant sought to relieve himself of responsibility by claiming that his engineer alone was responsible. This is exactly the defense as set up by this appellant, and the case cited clearly evinces the untenability of its position. In this connection the Supreme Court of Bogota states:

> "It is evident that the provision of the last of these articles assigns the responsibility not only for a person's own acts, but for the acts of another when these are executed by persons who are in the care or under the authority of others, in order that the latter may be responsible for the damages which the former may have caused to a third person, with the limitation and exception, however, that the responsibility of such persons ceases if by the exercise of the authority and care which their respective characters prescribe for and confer upon them they could not have prevented the act.
>
> "The Tribunal applying the disposition to the case of the suit, establishes the responsibility of the defendant as Empresario of the Railroad of the North, under whose authority the engineer of the locomotive which caused the fire was serving; and applying the rule contained in article 1604 of the Civil Code, that 'the proof of the diligence or care is incumbent on him who ought to have exercised it', the Tribunal deduces that the action having been directed not against the locomotive engi-

neer of the Railroad; but against the empresario, there is no necessity of ascertaining if there is a criminal responsibility on the part of the engineer, without for that reason pausing to consider if the civil action could have been instituted without regard to the criminal action, even before the existence of Law 169 of 1896, because it takes no notice of the existence of Law 62 of 1887, which reads as follows:

"'The empresarios of Railroads will be resonsible for the damages and injuries which they may cause to persons and property by reason of the services of said roads and which may be imputable to carelessness, neglect, or violation of the police regulations which will be issued by the Government as soon as the present law is promulgated.'

"In spite of the provisions of this law, it is contended by the attorney of Davila, that the engineer of the railroad company would not be considered as his dependent or subordinate (dependiente), but solely as his employe (empleado) and that for that reason he does not have to respond for the act which is being inquired into; *but in the opinion of the Tribunal if it is true that in order that the responsibility of which the Civil Code treats may exist, there ought at the same time to be a dependence (dependencia) between the empresario and the agent of the act. It is no less true that this dependence may be recognized as a matter of law, nor is it necessary that the dependence be absolute: It suffices if the act be executed by reason of the service entrusted to the individual who serves under the empresario, for in all the functions with which he is charged he preserves the character of a dependent (dependiente) of the empresario* (pp. 136, 137, 138, Plaintiff-in-Error's Brief). (Italics ours.)

In other words, the case cited and apparently relied upon by plaintiff-in-error discloses that a judgment was rendered in damages against the defendant company for

the negligence of an employe of the company, in the sum of four thousand four hundred and two pesos ($4,402.00), together with the costs of suit. How this case tends in any way to support the contention of plaintiff-in-error is a matter of the deepest mystery.

In conclusion of the first assignment of error (pp. 55-60, Plaintiff-in-Error's Brief), appellant states that, "decisions of the Courts of the various states of the Union may be found announcing principles somewhat similar to those involved in the Colombian and Panamanian cases cited in his brief", and then refers to the case of *Isaac* vs. *Third Avenue R. R. Co.,* 47 N. Y. page 122. Why plaintiff-in-error should burden this court with a citation of this character which is manifestly not in support of any contention raised in his brief, and especially in view of the fact that he has said we cannot go beyond the authorities of the civil law in order to determine this cause, we cannot understand. Even the doctrine as laid down in that case has been overruled in the case of *Stewart* vs. *Brooklyn & Crosstown R. Co.,* 90 N. Y. 588.

Under the Civil Law, the Employer is Liable for the Negligence of His Employe when the Latter is Acting within the Scope of His Employment.

As counsel for plaintiff-in-error seems to have wandered all over the universe in his attempt to find some law to support his first assignment of error, it behooves us to advise this court as to the law on this subject in the following jurisdictions based upon principles of the civil or Roman law.

> "Civil actions for the recovery of damages for injuries to persons and property caused by the fault or negligence of another have been recognized both by the Roman and the civil law."
>
> *4 Ganel & Sanches, Codico Civil Espanol,* 894;
>
> *6 Toullier, Le Droit Civil Francais,* 94.

THE PHILIPPINES:

> "It is contended by the defendant, as its first defense to the action, that the necessary conclusion from these collated laws is that the remedy for injuries through negligence lies only in a criminal action in which the official criminally responsible must be made primarily liable, and his employer held only subsidiary to him. According to this theory the plaintiff should have procured the arrest of the representative of the company accountable for not repairing the track, and on his prosecution a suitable fine should have been imposed, payable primarily by him and secondarily by his employer.
>
> "*This reasoning misconceives the plan of the Spanish Code on this subject.* Article 1093 of the Civil Code makes obligations arising from faults or negligence not punished by law, subject to the provisions of chapter two of title sixteen. Section 1902 of that Chapter reads:
>
> > "A person who by an act or omission causes damage to another when there is fault or negligence, shall be obliged to repair the damage as done." *Idem.* (Italics ours.)
>
> *Rakes* vs. *A. G. & P. Co.,* 7 Philippines, 359.

In the case of *Dampfschieffs Rhederie Union* vs. *La Compagnia Transatlantica,* 8 Phil. 766, where the captain of a ship negligently ran into and damaged another, the company that owned the ship causing the damage was held liable.

PORTO RICO:

In *Venturo Munich* vs. *Ramon Valdez,* 3 Porto Rico Fed. Rep. 251, it was held that the defendant, the owner of a railroad, was liable in damages for the negligence of the employes of the railroad company which caused injury to a passenger.

In *Maria Play Hernandez* vs. *San Juan Light & Tran-*

sit Co., 3 Porto Rico Fed. Rep. 138, it was decided that the plaintiff, who was injured as a result of the collision of a trolley car of the defendant company with the automobile in which he was riding, could recover damages against the company.

In *Morales* vs. *San Juan Light & Transit Company,* 4 Porto Rico Fed. Rep. 361, the defendant company was held liable in damages to the plaintiff, a collision having occurred between the carriage in which plaintiff was riding and a car of the company, the employes of defendant being negligent.

In the case of *Garcia* vs. *Gorgetti et al.,* 4 Porto Rico Fed. Rep. 495, the defendant was held liable for the negligence of his chauffeur in running into plaintiff.

In *Gonzalez* vs. *San Juan Light & Transit Company,* 5 Porto Rico Fed. Rep. 602, it was held that a person injured through the negligence of employes of a street railway company by the starting of a car before plaintiff had been given sufficient time to alight, was entitled to recover against the company.

LOUISIANA:

> "The civil code of this state enunciates the rule of *respondeat superior* in *terms which exactly correspond to the rule of the common as well as of the civil law. Masters and employers are answerable for damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed."* (Italics ours.)
>
> *Williams* vs. *The Pullman Palace Car Company,* 40 La. Ann. 87.

In *Black* vs. *Rock Island A. and L. R. R. Co. et al.,* 125 La. 102, the Court said:

> "This Court has said, however, in a case on which defendants seem to rely, that the earlier doctrine that in general a master is liable for the fault or negligence of the servant, but not for the

wilful wrong or trespass, has been greatly modified in modern jurisprudence, which places the test of the master's liability, not in the motive of the servant or the character of the wrong, but in the injury, whether the act done was something which his employment contemplated and which, if properly and rightfully done, would have been within the scope of his functions. * * *

A railroad corporation, being incorporeal and incapable of acting save through agents selected by it, when it places in the custody and under the control of certain agents so selected, its depot, locomotives and tracks, and vests in them the authority to operate the locomotives over the tracks, with a certain discretion and subject to certain instructions, but with the actual power to operate them when they please, must be regarded as represented by such agents, within the sphere of authority conferred upon them, and should be held liable to the third person, injured through the negligence or improper use or abuse of the power and discretion vested in such agents." * * *

We do not deem it necessary to cite further decisions of the Supreme Court of Louisiana. They are unanimous in upholding the doctrine that the master is liable for the acts of his servant when the latter is acting within the scope of his employment.

THE CANAL ZONE:

With reference to this same contention, in the case of *Fitzpatrick* vs. *The Panama Railroad Company,* 2 Canal Zone Supreme Court Reports, 112, l. c., 128, the Court said:

> "Therefore, a careful review of the decisions of the Supreme Court of Panama and Colombia, the Courts of the Philippines and Porto Rico, and particularly of the Supreme Court of Louisiana, lead to the conclusion that, at least so far as the empresarios of railroads are concerned, they must,

> within the Canal Zone, be held liable for the negligent acts of their servants, agents, and employes, by the adoption of the rule of *respondeat superior* as that rule is understood and applied in the States of the Union. Viewed, therefore, both from the standpoint of the provisions of the Civil Code as applicable here, and also from the standpoint of the general rules of negligence under the common law, we hold that the defendant company was liable for the admittedly negligent acts of its agent in causing the injury to Fitzpatrick." (Italics ours.)

From the foregoing citations, it is apparent that the doctrine of *respondeat superior* is followed in countries whose jurisprudence is founded on civil as well as common law.

In reply to plaintiff-in-error's second assignment we respectfully submit that there is nothing whatsoever in the record to substantiate the theory of an intervening cause, that is, the boy on the bicycle being either directly or indirectly responsible for defendant-in-error's injuries. In this connection, we respectfully invite the Court's attention to a reading of pages 17, 28, 29 of the record.

Reply to Third Assignment of Error.

Damages for Physical Pain and Suffering are Recoverable In a Tort Action in the Canal Zone.

Plaintiff-in-error in this last assignment asserts that no claim for damages can be allowed in a tort action by way of mental and physical pain and suffering, and that the Court erred when instructing the jury to the effect that it had a right to consider same in assessing damages.

The Circuit Court of Appeals in disposing of this assignment, states:

> "Under the jurisprudence of the Canal Zone, we think a proper interpretation of sections 2341 and 2356, damages for physical pain and suffering are recoverable" (p. 40 of the Record).

The two sections of the Code last referred to, read as follows:

> "Art. 2341. He who has committed an offense or fault resulting in injury to another is obliged to indemnify him, without prejudice to the principal penalty that the law may impose for the fault or offense committed."
>
> "Art. 2356. As a general rule, every injury imputed to malice or negligence, of another person, shall be repaired by the latter."

Later the Circuit Court of Appeals again had occasion to pass upon this identical question. However, at the subsequent hearing, two Circuit Court of Appeal judges, other than those who heard the instant case, were on the bench. In this case, it was stated:

> "Under the law in force in Panama and in the Canal Zone, damages for physical pain and suffering are recoverable in such an action as the instant one. *Panama R. Co.* vs. *Bosse*, 239 Fed. 303, 152 C. C. A. 291. A ruling of the court to this effect, which was assigned as error, was in conformity with the decision just cited, and was not erroneous."
>
> *Panama R. Co.* vs. *Toppin*, 250 Fed. 989.

From the above it would seem that this question has already been considered by no less than five different justices of an Appellate Court wherein interpretations of the civil law are frequent.

Appellant would try to have this Court believe (p. 63, Brief of Plaintiff-in-Error), that neither the trial court nor the Circuit Court of Appeals, considered articles 1613 and 1614 of the Civil Code when disposing of this issue.

Manifestly, such is not the case, for the trial court as well as the Circuit Court of Appeals was well aware of these sections of the Code, for appellant in his brief in the Circuit Court of Appeals laid great stress on same.

Let us first refer to one of the cases cited by appellant in support of the contention that even under the Colombian law, damages for pain and suffering can be awarded. Even though the statement was merely obiter, on page 95 of plaintiff-in-error's brief, in the appendix thereto, in the case of *Felipe Ramirez* vs. *The Panama R. Co.* is found the following:

> "The sum of sixty thousand pesos which Mr. Ramirez claims through his attorney, Mr. Isidoro Burgos, for damages and injuries received, would not compensate, even in a small degree the physical and mental sufferings of the injured party. His misfortune is lamentable, for, though it may not be permanent, as may be deduced from the prognosis of the physican, Dr. Jorge E. Delgado, there are mental sufferings, which though not tangible, yet we can all appreciate, principally when they do not affect us personally."

This language of the Supreme Court of Colombia, certainly indicates that physical and mental pain and suffering would be considered by that tribunal as an element of damage, and the only reason why judgment was not rendered against the Panama Railroad Company in that case was, as has heretofore been shown, simply because the plaintiff in that action was injured in a fight with C. Smith, who "casually lent his services to the company", and whose action in injuring the plaintiff was not within the scope of his employment.

To call the attention of this Court to what the Supreme Court of the Republic of Panama may or may not have done in certain cases, and ask it to be guided accordingly is too absurd for serious thought. Hence, we shall not burden this Court by replying to such portions of plaintiff-in-error's brief.

The codes of Louisiana, Porto Rico, the Philippines

and the Canal Zone are practically identical with reference to actions of this nature. By the great weight of authority, in jurisdictions under American control wherein civil law prevails, damages can be awarded for pain and suffering, and the Philippine case cited by plaintiff-in-error is the only one that might be found to the contrary.

PORTO RICO:

> "In cases of personal injury by a railroad accident, under the damage act, 1803 and 1804 of the Civil Code of Porto Rico of 1902, where there is no malice in or about the occurrence, compensatory damages are all that can be recovered, and the measure of the same is the extent of the injury done and its character, whether permanent or temporary, *the amount of suffering he endured or may have to endure during life,* if it is permanent, and the effect it has upon his earning capacity, the amount of time lost by reason thereof, and the cost of the sickness for physicians, drugs, medicines, and surgical treatment, if any." (Italics ours.)
>
> *Martinez* vs. *Am. Ry. Co.,* 5 Porto Rico Fed. Rep. 311.

Section 1803 of the Civil Code of Porto Rico referred to in the decision is identical with the section of the Civil Code of the Canal Zone. It reads as follows:

> "A person who, by an act or omission, causes damage to another when there is fault or negligence, shall be obliged to repair the damage so done."
>
> "In estimating damages for personal injury, *the jury may consider pain and suffering,* medical attendance, loss of time, past, present and future, and of salary." (Italics ours.)
>
> *Wood* vs. *Valdez,* 4 Porto Rico Fed. Rep. 165.

"In estimating damages the jury may consider the extent of the injuries, expectancy of injured child's life, *suffering he may have to endure through life,* physically and mentally, and his impaired ability to earn a living." (Italics ours.)

Garcia vs. *Ponce Ry. and Light Co.,* 4 Porto Rico Fed. Rep. 4.

"In estimating damages the jury may consider plaintiff's age, earning capacity and loss thereof, medicines, medical attendance, *suffering, future expenses, probable duration of injuries and suffering* and loss of earnings." (Italics ours.)

Guzman vs. *Herencia,* 4 Porto Rico Fed. Rep. 105; Affirmed in 55 Law. Ed. U. S. Rep. 81.

LOUISIANA:

"The jury allowed plaintiff $1,000. We *fix the damages for suffering and permanent injuries at* $3,000, which with the $1,799.69 of actual expenses, makes an aggregate of $4,799.69, for which the plaintiff is entitled to judgment." (Italics ours.)

Hanna vs. *New Orleans Ry. and Light Co.,* 126 La. 634; l. c. 638.

"The verdict is perhaps somewhat large, but we could assign no positive reason for reducing it. The injuries are of the gravest character and are permanent; and, *besides, the sufferings have been very great, and plaintiff is destined to continue to suffer."* (Italics ours.)

Lee vs. *Powell Brothers and Sanders Co.,* 126 La. 51; l. c. 59.

"According to the evidence she will hereafter require, not only some one to wait upon her constantly, but she will never be able to dispense with

the services of a physician, which element considered, *and also the mental anguish and physical pain which she has endured, and is to endure, we are of the opinion that, though there can be no such thing as adequate compensation, the amount awarded by the District Court should be increased.*" (Italics ours.)

Egbert vs. *New Orleans Ry. and Light Co.*, 128 La. 474; l. c. 486.

It would be futile to cite further Louisiana authorities. In this regard, they are unanimous in holding that damages can be recovered for pain and suffering. There is no decision to the contrary, even by inference.

CANAL ZONE:

This same question was raised by the same counsel for the same plaintiff-in-error before the Supreme Court of the Canal Zone in the case of *Fitzpatrick* vs. *The Panama Railroad Company* and in the case of *Toppin* vs. *The Panama R. Co.* The same cases were cited in the brief in the Fitzpatrick case by appellant as are cited here by plaintiff-in-error. In the Fitzpatrick case with reference to the claim of the Panama Railroad Company that damages for physical pain and suffering could not be allowed, the Court said:

"It may be said that the codes of Louisiana, Porto Rico, the Philippines, and the Canal Zone, are practically identical in this respect, and, *if it were necessary to look beyond the decision of this court in the case of Reese* vs. *Shay, we find abundant authority in Porto Rico and Louisiana in support of the appellee's contention that damages for pain and suffering were properly awarded by the Court below.* In *Martinez* vs. *Am. Ry. Co.*, 5 Porto Rico Fed. Rep. 311, the Court said:

'Where there is no malice in or about the occurrence, compensatory damages are all that

can be recovered, and the measure of the same is the extent of the injury done and its character, whether permanent or temporary, the amount of suffering he endured or may have to endure during life.'

In the cases of *Wood* vs. *Valdez,* 4 Porto Rico Fed. Rep. 165; *Garcia* vs. *Ponce Railway and Light Co.,* 4 Porto Rico Fed. Rep. 4, and *Guzman* vs. *Herencia,* 4 Porto Rico Fed. Rep. 105, the juries in each case were instructed by the Court that they could take into consideration, in estimating the damages for personal injury, the pain and suffering of the injured party. The Louisiana Courts have similarly decided in a number of cases of which the following may be simply referred to: *Hanna* vs. *New Orleans Railway and Light Co.,* 126 La. 634; *Lee* vs. *Powell,* 126 La. 51; *Egbert* vs. *New Orleans Railway and Light Co.,* 128 La. 474.

In fact we can see no ground of error arising out of the question of damages awarded." (Italics ours.)

Fitzpatrick vs. *The Panama R. Co.,* page 3, Vol. 2, Supreme Court Reports Canal Zone, l. c. 129-130.

Again the Supreme Court of the Canal Zone in passing upon this subject had occasion to state:

"Moreover, it must be said that the plaintiff was undoubtedly entitled to recover for *pain and suffering:* and the loss of an eye under the circumstances detailed in the evidence at the trial below must certainly have caused the most excruciating *pain and suffering, mental* and *physical.* Under all the circumstances we are compelled to say that we do consider the sum of $500.00 to be wholly inadequate, especially when we consider the youth of the plaintiff, who was but 24 or 25 years of age, and who must go through life per-

manently disfigured and with every reasonable human presumption of a permanent diminution of earning capacity."

McKenzie vs. *McClintic-Marshall Const. Co.*, page 181, Vol. 2, Supreme Court Reports Canal Zone, l. c. 181-182-183.

It is apparent the objection urged by plaintiff-in-error under this assignment, does not merit serious consideration. Defendant-in-error respectfully insists that the opinion of the Circuit Court of Appeals be sustained.

THEODORE C. HINCKLEY of
HINCKLEY & GANSON and
JOSEPH W. BAILEY
Attorneys for Defendant-in-Error.

PANAMA RAILROAD COMPANY *v.* BOSSE.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 203. Submitted January 31, 1919.—Decided March 3, 1919.

An order of the President continuing in force for the government of the Canal Zone "the laws of the land, with which the inhabitants are familiar," etc., was construed by the Government as including

the Civil Code of Panama, and was followed by an act of Congress ratifying the laws, orders, etc., promulgated by the President. *Held*, that the order merely embodied the rule that a change of sovereignty does not end existing private law, and that the act neither fastened upon the Zone a specific civil-law interpretation of the Code nor overthrew the principle of common-law construction adopted and applied by the Supreme Court of the Zone before the act was passed. P. 44.

The provisions of the Civil Code of the Canal Zone touching the relation of master and servant are not inconsistent with the common-law rule holding the former liable for personal injuries caused by the negligence of the latter while in the course of his employment; and it is not erroneous for the Supreme Court of the Zone to apply the common-law interpretation, at least in cases arising since the Zone was expropriated and became peopled only by the employees of the Canal, of the Panama Railroad and of licensee steamship lines and oil companies. P. 45.

Pain may be considered in fixing damages for personal injuries in the Canal Zone. P. 47.

239 Fed. Rep. 303, affirmed.

The case is stated in the opinion.

Mr. Frank Feuille for plaintiff in error. *Mr. Walter F. Van Dame* was also on the brief.

Mr. Theodore C. Hinckley and *Mr. Joseph W. Bailey* for defendant in error.

Mr. Justice Holmes delivered the opinion of the court.

This is an action for personal injuries and consequent suffering alleged to have been caused, on July 3, 1916, by the Railroad Company's chauffeur's negligent driving of a motor omnibus at an excessive rate of speed in a crowded thoroughfare in the Canal Zone. The suit was brought in the District Court of the Canal Zone. The defendant, the plaintiff in error, demurred to the declaration generally, and also demurred specifically to that part that claimed damages for pain. The demurrer was overruled

and there was a trial, at which, after the evidence was in, the defendant requested the Court to direct a verdict in its favor and, failing that, to instruct the jury that the plaintiff could not recover for physical pain. The instructions were refused, the jury found a verdict for the plaintiff and the judgment was affirmed by the Circuit Court of Appeals. 239 Fed. Rep. 303. 152 C. C. A. 291. Followed in *Panama R. R. Co.* v. *Toppin*, 250 Fed. Rep. 989.

The main question in the case is whether the liability of master for servant familiar to the common law can be applied to this accident arising in the Canal Zone. Subordinate to that is the one already indicated, whether there can be a recovery for physical pain. There is some slight attempt also to argue that the defendant's negligence was not the immediate cause of the injury, but as that depended upon the view that the jury might take of the facts and as there was evidence justifying the verdict, we shall confine ourselves to the two above-mentioned questions of law.

By the Act of Congress of April 28, 1904, c. 1758, § 2, 33 Stat. 429, temporary powers of government over the Canal Zone were vested in such persons and were to be exercised in such manner as the President should direct. An executive order of the President addressed to the Secretary of War on May 9, 1904, directed that the power of the Isthmian Commission should be exercised under the Secretary's direction. The order contained this passage, "The laws of the land, with which the inhabitants are familiar, and which were in force on February 26, 1904, will continue in force in the canal zone . . . until altered or annulled by the said commission;" with power to the Commission to legislate, subject to approval by the Secretary. This was construed to keep in force the Civil Code of the Republic of Panama, which was translated into English and pub-

lished by the Isthmian Canal Commission in 1905. By the Act of Congress of August 24, 1912, c. 390, § 2, 37 Stat. 560, 561, "All laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the Canal Zone and the construction of the Panama Canal are hereby ratified and confirmed as valid and binding until Congress shall otherwise provide." On these facts it is argued that the defendant's liability is governed by the Civil Code alone as it would be construed in countries where the civil law prevails and that so construed the code does not sanction the application of the rule *respondeat superior* to the present case.

But there are other facts to be taken into account before a decision can be reached. On December 5, 1912, acting under the authority of the before-mentioned Act of August 24, 1912, § 3, the President declared all the land within the limits of the Canal Zone to be necessary for the construction &c. of the Panama Canal and directed the Chairman of the Isthmian Commission to take possession of it, with provisions for the extinguishment of all adverse claims and titles. It is admitted by the plaintiff in error that the Canal Zone at the present time is peopled only by the employees of the Canal, the Panama Railroad, and the steamship lines and oil companies permitted to do business in the Zone under license. If it be true that the Civil Code would have been construed to exclude the defendant's liability in the present case if the Zone had remained within the jurisdiction of Colombia it does not follow that the liability is no greater as things stand now. The President's order continuing the law then in force was merely the embodiment of the rule that a change of sovereignty does not put an end to existing private law, and the ratification of that order by the Act of August 24, 1912, no more fastened upon the Zone a specific interpretation of the former Civil

Code than does a statute adopting the common law fasten upon a territory a specific doctrine of the English Courts. *Wear* v. *Kansas*, 245 U. S. 154, 157. Probably the general ratification did no more than to supply any power that by accident might have been wanting. *Honolulu Rapid Transit & Land Co.* v. *Wilder*, 211 U. S. 137, 142. In the matter of personal relations and duties of the kind now before us the supposed interpretation would not be a law with which the present "inhabitants are familiar," in the language of the President's order, but on the contrary an exotic imposition of a rule opposed to the common understanding of men. For whatever may be thought of the unqualified principle that a master must answer for the torts of his servant committed within the scope of his employment, probably there are few rules of the common law so familiar to all, educated and uneducated alike.

As early as 1910 the Supreme Court of the Canal Zone announced that it would look to the common law in the construction of the Colombia statutes, *Kung Ching Chong* v. *Wing Chong*, 2 Canal Zone Sup. Ct. Rep. 25, 30; and following that announcement, in January, 1913, held that "at least so far as the empresarios of railroads are concerned" the liability of master for servant would be maintained in the Zone to the same extent as recognized by the common law. *Fitzpatrick* v. *Panama R. R. Co.*, *id.*, 111, 121, 128. The principle certainly was not overthrown by the Act of 1912. It is not necessary to dwell upon the drift toward the common-law doctrine noticeable in some civil-law jurisdictions at least, or to consider how far we should go if the language of the Civil Code were clearer than it is. It is enough that the language is not necessarily inconsistent with the common-law rule. By Art. 2341, in the before-mentioned translation, "He who shall have been guilty of an offense or fault, which has caused another damage, is obliged to repair it, without

prejudice to the principal penalty which the law imposes" . . . By Art. 2347, "Every person is liable not only for his own acts for the purpose of the indemnity of damage, but also for the acts of those who may be under his care," illustrating by the cases of father, tutor, husband, &c. By Art. 2349, "Masters shall be responsible for the damage caused by their domestics or servants, on the occasion of a service rendered by the latter to the former; but they shall not be responsible if it be proved or appear that on such occasion the domestics or servants conducted themselves in an improper manner, which the masters had no means to foresee or prevent by the employment of ordinary care and the competent authority; in such case all responsibility for the damage shall fall upon said domestics or servants." The qualification in this last article may be taken to refer to acts outside the scope of the employment. It cannot refer to all torts, for that would empty the first part of meaning. A master must be taken to foresee that sooner or later a servant driving a motor will be likely to have a collision, which a jury may hold to have been due to his negligence, whatever care has been used in the employment of the man.

We are satisfied that it would be a sacrifice of substance to form if we should reverse a decision, the principle of which has been accepted by all the judges accustomed to deal with the locality, in deference to the possibility that a different interpretation might have been reached if the Civil Code had continued to regulate a native population and to be construed by native courts. It may be that they would not have distinguished between a negligent act done in the performance of the master's business and a malicious one in which the servant went outside of the scope of that for which he was employed. But we are by no means sure that they would not have decided as we decide. At all events we are of opinion that the ruling was correct. As we do not rely for our conclusion upon a

41. Syllabus.

Colombia act specially concerning the empresarios of railroads, we do not discuss a suggestion, made only, it is said, to show that the act is inapplicable, to the effect that the charter of the Railroad Company did not grant the power to operate the omnibus line. The company was acting under the authority and direction of General Goethals and we do not understand that the defence of *ultra vires* is set up or could prevail.

In view of our conclusion upon the main point but little need be said with regard to allowing pain to be considered in fixing the damages. It cannot be said with certainty that the Supreme Court of the Zone was wrong in holding that under the Civil Code damages ought to be allowed for physical pain. *Fitzpatrick* v. *Panama R. R. Co.*, 2 Canal Zone Sup. Ct. Rep. 111, 129, 130; *McKenzie* v. *McClintic-Marshall Construction Co.*, *id.*, 181, 182. Physical pain being a substantial and appreciable part of the wrong done, allowed for in the customary compensation which the people of the Zone have been awarded in their native courts, it properly was allowed here.

Judgment affirmed.